Supreme Court, U.S.
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NO.

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1993

DEWEY SOWDERS, WARDEN — PETITIONER

- versus -

CLAUDE EARN CARTER — RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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31 pp

QUESTION PRESENTED FOR REVIEW

What standard is to be applied in determining whether a criminal defendant who is free on pre-trial bond has voluntarily waived the right to attend a deposition and confront his/her accuser?

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CLAUDE EARN CARTER — RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Dewey Sowders, Warden of the Northpoint Training Center and the Attorney General of the Commonwealth of Kentucky Petition for Writ of Certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit, granting a writ of habeas corpus in favor of respondent.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit (A 1-27) is reported as Carter v. Sowders, ___ F.2d ___ (6th Cir. 1993). The order of the Sixth Circuit denying the Commonwealth's petition for rehearing is not reported and is found at (A 28-30). The opinion of the United States District Court is not reported. (A 50-51). (October 31, 1991). The Magistrate Judge's Report, adopted by the District Court, is not reported and is reproduced at (A 31-49). The opinion of the Kentucky Supreme Court affirming the conviction is reported as Carter v. Commonwealth, Ky., 782 S.W.2d 597 (1989).

JURISDICTION

The judgment sought to be reviewed is that of the United States Court of Appeals for The Sixth Circuit decided and filed September 27, 1993. Carter v. Sowders, ___ F.2d ___ (No.

91-6419) [Appendix cited as "A"] (A 1-27), reversing the October 31, 1991 judgment of the United States District Court for the Western District of Kentucky (Civil Action No. 90-0197BG(M) (A 50-51). A Petition for Rehearing was denied December 16, 1993 (A 28-30). The jurisdiction of the United States District Court was invoked pursuant to Title 28 U.S..C. §2254. This Court has jurisdiction to review the opinion of the Sixth Circuit Court of Appeals pursuant to Title 28 U.S.C. §2254(1).

CONSTITUTIONAL STATUTORY PROVISIONS INVOLVED

The Fifth Amendment of the Constitution of the United States provides as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same

> offence [sic] to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment of the Constitution of the United States provides as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

The Due Process Clause of Section 1 of the Fourteenth Amendment of the Constitution of the United States provides as follows:

> [N]or shall any State deprive any person of life, liberty, or

property without due process of law[.]

STATEMENT OF THE CASE

Respondent was tried in Kentucky state court for possession and sale of marijuana and LSD and being a first-degree persistent felony offender following an investigation spanning Tennessee and Kentucky. Charles Elam was a salaried narcotics agent with the Dyersburg Tennessee Police Department. Elam and Billy Driskell purchased marijuana and LSD from respondent in Kentucky and then returned to Tennessee where Elam reported to the Union City Police Department. (A 1-3).

Elam was a material and necessary witness for the Commonwealth. The prosecutor feared he could not produce live testimony from Elam at trial, so to preserve that testimony, he moved to videotape Elam's deposition. Using the Non-Resident Witness Act in Tennessee (T.C.A.

40-17-203) and then in Oklahoma (22 Okl.St.Ann. §722), Elam was brought to Kentucky on June 30, 1986 for a court-ordered deposition. (A 3-7).

It is uncontradicted that opposing counsel, Hon. Louis Waller, received timely notice of the deposition via letter and appeared at the scheduled hour. (A 34; A 52-58). Waller advised respondent of the deposition by letter and tried to reach him by phone the day before the deposition as well. Unable to locate his client, and feeling insufficiently prepared to cross-examine Elam, Waller served notice of his intention to withdraw as counsel and left the deposition. Counsel said he had not required respondent's presence at the deposition and had told respondent "you may wish to be present" at the deposition, assuming this would prompt respondent to contact him to discuss strategy. (A 54).

Respondent, free on pre-trial bond, never contacted Waller. Before leaving the deposition, Waller acknowledged he was bound to represent respondent until the court released him from that obligation. Waller left, Elam was sworn, and the prosecutor questioned Elam without respondent or Waller.

Trial began January 6, 1987. Elam could not be found. Phone calls went unanswered, mail was returned as undeliverable and a subpoena naming Elam was issued but not served. (A 38-39). The Commonwealth successfully moved to admit Elam's sworn videotaped deposition in lieu of live testimony. Respondent's new attorney, Hon. Robert Hedges, objected to use of the deposition and tried to quash it due to respondent's absence and alleged lack of representation and cross-examination. The motion to quash was denied, but not until trial. (A 6-7).

Respondent was found guilty of trafficking in LSD and possession of marijuana on January 7, 1987. The court recessed for the evening with direction that trial resume with the penalty phase the following morning at 9:00 a.m. Respondent remained free on bail and did not return. After waiting well over an hour, and hearing testimony from respondent's father that respondent departed at 2:00 a.m., the trial court allowed the jury to set punishment in respondent's voluntary absence.

The Kentucky Supreme Court affirmed the conviction finding respondent waived the right to confront Elam. Carter v. Commonwealth, Ky., 782 S.W.2d 597 (1990). The opinion holds: respondent waived the right to confront Elam; counsel received ample notice of the taking of the deposition and consciously decided not to remain at the deposition and cross-examine Elam; the record was devoid of evidence respondent had

a legal reason for not attending the deposition; there was no proof respondent's presence would have made a difference; counsel neither requested a continuance nor objected to the taking of the deposition; the Commonwealth made a good faith effort to produce live trial testimony from Elam; and, the Commonwealth could not use the Uniform Non-Resident Witness Act at trial since Elam's whereabouts were unknown and therefore, Elam was unavailable at the time of trial. Id.

After this Court denied respondent's petition for certiorari, he sought a writ of habeas corpus in federal district court under 28 U.S.C. §2254. The magistrate judge recommended denial of the petition, and the district court agreed, finding: Elam's deposition was properly admissible under F.R.C.P. 804 pursuant to the "declarant unavailable/former testimony" exception to the hearsay rule; respondent, via

his attorney, had the opportunity to cross-examine Elam but did not seize it; respondent was not denied counsel at a critical stage as Waller represented respondent until the trial court granted the motion to withdraw; while counsel could have moved to postpone the deposition, he did not; the Commonwealth made a good faith effort to present live trial testimony from Elam; the Commonwealth could not subpoena Elam or use the Non-Resident Witness Act for trial because the prosecution was unable to locate Elam; and, Elam could not be subpoenaed for trial while testifying at the deposition as that would have violated KRS 421.260. (A 31-49). The district court adopted the magistrate judge's report in full and denied the petition for writ of habeas corpus. (A 50-51).

The United States Court of Appeals for the Sixth Circuit reversed the decision of the

district court finding respondent was entitled to the writ because: Elam's deposition was hearsay and erroneously admitted; without cross-examination, the jury lacked sufficient basis to evaluate the truthfulness of Elam's deposition; respondent was denied the opportunity to confront Elam; even if respondent received Waller's letter it was incomplete in that it failed to tell respondent he had a constitutional right to attend the deposition and failed to specify the consequences of failing to attend; and finally, respondent did not personally waive his right of confrontation. (A 1-27). A Petition for Rehearing was denied. (A 28-29).

REASONS FOR GRANTING THE WRIT

The focus of this petition is whether a criminal defendant who is free on pre-trial bond waives the right to confrontation by not attending a deposition of which he/she has

notice. The Sixth Circuit answered this question in the negative based upon Johnson v. Zerbst, 304 U.S. 458, 464 (1938), which requires "intentional relinquishment of a known right or privilege," and Boyd v. Dutton, 405 U.S. 1, 2-3 (1972), which directs that a right "may be waived only by voluntary and knowing action." (A 20-21). Under the Sixth Circuit's interpretation of Zerbst, inaction could never constitute waiver. Furthermore, a personal on-the-record statement by the defendant would be required for valid waiver. The byproduct of this ruling is that an attorney could never enter a valid waiver for his client, even if he did so with express authority of the client. While personal waiver from the accused may be preferred, it is not constitutionally mandated. United States v. Polizzi, 926 F.2d 1311, 1322 (2nd Cir. 1991).

The Sixth Circuit's approach is inconsistent with this Court's opinions in Diaz v. United States, 223 U.S. 442, 451-3 (1912) and Taylor v. United States, 414 U.S. 17 (1973), both of which clearly hold voluntary absence from a proceeding constitutes waiver. Even the Second Circuit has realized requiring a personal in-court statement from the accused to effectuate a valid waiver would create a "burdensome, impractical and wholly unnecessary" rule which taken to its logical conclusion "would work the unwieldy result of leaving ineffective as a waiver the voluntary failure to appear for trial." Polizzi, at 1322; United States v. Sanchez, 790 F.2d 245, 250 (2d Cir.), cert. denied 479 U.S. 989 (1986). This is precisely the situation created by the Sixth Circuit opinion. After being notified of a court-ordered deposition, respondent neither contacted his attorney, nor appeared at the

deposition. Although respondent has never denied knowing about the deposition, and has never explained his absence, the Sixth Circuit refused to find respondent's voluntary absence waived his right of confrontation.

The rationale for permitting voluntary absence to constitute valid waiver was ably expressed by this Court in Diaz:

> "It does not seem to us to be consonant with the dictates of common sense that an accused person, being at large upon bail, should be at liberty, whenever he pleased, to withdraw himself from the courts of his country and to break up a trial already commenced. The practical result of such a proposition, if allowed to be law, would be to prevent any trial whatever until the accused person himself should be pleased to permit it. For by the statute (U.S. Rev. Stat. § 1015, U.S. Comp. Stat. 1901, p. 718) he is entitled as a matter of right to be enlarged upon bail 'in all criminal cases where the offense is not punishable by death;' and therefore, in all such cases, he

may, by absconding, prevent a trial. This would be a travesty of justice which could not be tolerated; and it is not required or justified by any regard for the right of personal liberty. On the contrary, the inevitable result would be to abridge the right of personal liberty by abridging or restricting the right now granted by the statute to be abroad on bail until the verdict is rendered.

. . .

"The question is one of broad public policy, whether an accused person, placed upon trial for crime, and protected by all the safeguards with which the humanity of our present criminal law sedulously surrounds him, can with impunity defy the processes of that law, paralyze the proceedings of courts and juries, and turn them into a solemn farce, and ultimately compel society, for its own safety, to restrict the operation of the principle of personal liberty. Neither in criminal nor in civil cases will the law allow a person to take advantage of his own wrong. And yet this would be precisely what it would do if it permitted an escape from prison, or an absconding from the jurisdiction while at large on bail, during the

> pendency of a trial before a jury, to operate as a shield."

Diaz, at 506 citing Falk v. United States, 15 App.D.C. 446, 454, s.c. 180 U.S. 636, 45 L.Ed. 709, 21 Sup. Ct. Rep. 923. As further stated in Diaz,

> where the offense is not capital and the accused is not in custody, the prevailing rule has been, that if, after the trial has begun in his presence, he voluntarily absents himself, this does not nullify what has been done or prevent the completion of the trial, but, on the contrary, operates as a waiver of his right to be present, and leaves the court free to proceed with the trial in like manner and with like effect as if he were present. (citations omitted).

223 U.S. at 455.

While both Diaz and Taylor pertain to confrontation in the context of absentia from trial, the same concerns exist during a pre-trial deposition. Chiefly, those concerns are that a defendant who is free on bond can ignore notification of a court-ordered

proceeding and disrupt the legal process by avoiding the courthouse. Various courts have applied the "voluntary absence constitutes waiver" standard to pre-trial depositions. For example, in Owings v. State, 622 N.E.2d 948, 953 (Ind. 1993), the Indiana Supreme Court held a defendant waived the right to confrontation by failing to attend a deposition. Owings was free on bond at the time of the deposition and is presumed to have received notice because her attorney was served. The only hint in the record that Owings's absence may not have been a voluntary relinquishment of a known right is that the deposition was taken in a youth detention facility from which her entry was barred. However, because Owings never asked that she be allowed to enter the facility, and never asked that the deposition be moved to another location, the court determined she had

indeed waived her constitutional right to confrontation.

Similarly, in United States v. King, 552 F.2d 833 (9th Cir. 1976), voluntary absence was an effective waiver. The defendants and their attorneys balked at restrictions imposed by the Japanese government when depositions of two drug offenders imprisoned in Japan were taken for use at trial in America. "[T]he witnesses were under oath; the defendants were represented by counsel with the opportunity for cross-examination; and the proceedings were before an authorized hearing officer who was equipped to take and preserve the testimony." Id., at 842-3. During cross-examination of the first witness, the defendants and their attorneys refused to participate further and left. The second witness was deposed wholly outside the presence of the defendants or their

counsel. Citing Zerbst, the Ninth Circuit stated:

> By absenting themselves from the proceedings, by failing to avail themselves of the opportunity to cross-examine the Government witnesses, even if under less than perfect conditions, the appellants intentionally and knowingly gave up both the right to be present and to object to future use of the testimony. It was a calculated act, undertaken with knowledge of the potential consequences.

Id., at 844.

Since voluntary absence can validly waive presence at trial, there is no logical reason for a different standard to apply to a pre-trial deposition. This is especially true since "voluntary absence" has also been held to waive the right to attend a pre-trial hearing. In United States v. Rewald, 889 F.2d 836, 854 (9th Cir. 1991), the Ninth Circuit found the accused voluntarily waived the right to attend a hearing in Hawaii because he "earlier had sought

and obtained bail conditions that permitted him to reside in Los Angeles, California, where he had a job paying $1,000 per week." In finding no violation of the right to confrontation, the court noted: Rewald never told the trial court he wanted to personally attend the hearing; counsel never objected to his client's absence; and the trial court never entered any order prohibiting Rewald's attendance at the hearing. This same analysis applies equally well to a pre-trial deposition. Thus, the language of Brewer v. Raines, 670 F.2d 117, 119 (9th Cir. 1982), "When, after sufficient notice, a defendant voluntarily absents himself from any proceeding, he waives any right he has to be present at that proceeding," is both appropriate and accurate. In short, a defendant who is free on bond should not be allowed to circumvent a court order simply by avoiding the courthouse.

The primary concern is whether a criminal defendant who takes no action knows he has the right to act. In other words, does he have notice? Once a party is represented by counsel, service of notice upon counsel constitutes notice to the client. United States v. Everett, 700 F.2d 900, 902 n.5 (1983); See generally In re Oliver, 333 U.S. 257, 273 (1948). In our system of representative litigation, each party is bound by the acts of his lawyer-agent. Link v. Wabash Railroad Co., 370 U.S. 626, 634 (1962); Irwin v. Veterans Administration, 498 U.S. 89 (1990). There is no contention respondent's attorney did not receive notice of the deposition. In fact, respondent's attorney cleared his schedule to attend the depostion. (A 53-54). Counsel then sent a letter to respondent advising him of the deposition and tried to reach respondent via

family members when respondent failed to contact him. (A 54-55).

Having determined respondent was aware of the scheduled deposition, how could he validly waive his presence at the deposition and his right to confront an adverse witness? Waiver can occur in a myriad of ways. For example, the accused could agree not to cross-examine witnesses or stipulate to the admission of evidence. United States v. Carlson, 547 F.2d 1346, 1358 (8th Cir. 1976). He could waive through repeated disruptive and disorderly conduct. Illinois v. Allen, 397 U.S. 337, rehearing denied 398 U.S. 915 (1970). He could enter a guilty plea, Boykin v. Alabama, 395 U.S. 238 (1969), or he could fail to return from a recess. Taylor, supra. Despite these various methods of effectuating a valid waiver, the Sixth Circuit has declined to recognize that a defendant voluntarily relinquishes a known

right by not attending a pre-trial deposition of which he has notice. Further, while other courts plainly adhere to the principle that "[a]bsence without compelling justification constitutes waiver," the Sixth Circuit has granted relief without any such showing. Respondent has never been required to offer any explanation, compelling or otherwise, for his absence. United States v. Wright, 932 F.2d 868, 879 (10th Cir. 1991); United States v. Peterson, 524 F.2d 167, 184-5 (4th Cir. 1975) cert. denied, 423 U.S. 1088 (1976).

Diaz and Taylor clearly establish that voluntary absence from trial constitutes valid waiver of the right to be present at trial and to confront adverse witnesses. The Sixth Circuit has misinterpreted Zerbst, supra to require a personal on-the-record statement from the accused to waive the right of confrontation at a pre-trial deposition. This view

contradicts precedent from this Court as well as state and federal circuit courts.

Respondent bears a heavy burden of demonstrating entitlement to a writ of habeas corpus. Nevertheless, the Sixth Circuit has granted the writ even though respondent has offered no proof in support of his claim that he was denied the right of confrontation. Under Polizzi, King and Taylor, supra, his voluntary failure to attend the deposition should have been deemed waiver of the right to be present and to confront Elam. At a minimum, the Sixth Circuit should have allotted the burden to respondent to prove lack of notice as this was a habeas corpus proceeding. Polizzi, at 1321. Instead, the Sixth Circuit has placed the onus upon the Commonwealth to prove respondent personally received actual notice and consented to counsel's conduct. Thus, the Sixth Circuit has erroneously granted a writ of habeas corpus

when the most to which respondent was entitled was a hearing in federal district court to give him yet another opportunity to explain why he did not attend Elam's deposition and why he failed to contact his attorney.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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PETITIONER'S APPENDIX

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RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 24

No. 91-6419

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CLAUDE EARN CARTER, Petitioner-Appellant,	)	
v.	)	ON APPEAL from the United States District Court for the Western District of Kentucky
DEWEY SOWDERS, Warden, Northpoint Training Center, Respondent-Appellee.	)	

Decided and Filed September 27, 1993

Before: MERRITT, Chief Judge; and KEITH and SUHRHEINRICH, Circuit Judges.

MERRITT, Chief Judge. Claude Earn Carter appeals the denial of his petition for a writ of

habeas corpus pursuant to 28 U.S.C. §2254. Petitioner was convicted of possession of marijuana and trafficking in LSD. Central to his conviction was the testimony of Charles Elam, Jr., a paid police informant. Elam's video deposition was taken in the absence of both petitioner and his counsel, and the deposition was later admitted, over petitioner's objection, at trial. Because petitioner did not waive his constitutional rights under the Confrontation Clause to confront his accuser and subject his testimony to cross-examination, the deposition did not bear adequate indicia of reliability for admission at trial. We therefore reverse the district court and grant the petition.

I.

Charles Elam was a salaried narcotics agent with the Dyersburg, Tennessee Police Department, earning $150/week. According to Elam's

deposition testimony, Elam and Billy Driskell purchased marijuana and LSD from petitioner at a house trailer in Kentucky on November 3, 1985, and returned to Tennessee. Elam then took a group of Tennessee police officers to Kentucky and showed them the trailer where the drugs were purchased. The trailer was searched under warrant November 5, and Carter was arrested while working in the fields near the trailer. He denied ownership of marijuana found in the trailer, or that he had ever met Elam.

Carter was indicted by the Logan County, Kentucky, Grand Jury on December 27, 1985 for the drug offenses and for being a first degree persistent felony offender. He was arraigned January 17, 1986, and the trial was set for April 24 of that year. In preparation for trial, the Commonwealth moved March 4 to take a videotape deposition of Elam, giving no specific ground. A second motion was filed March 17,

this time alleging that a pretrial deposition was necessary, since the Commonwealth could not secure the attendance of Elam, a Tennessee resident, at Carter's trial in Kentucky. The court granted the motion. On April 14, the Commonwealth subpoenaed three Kentucky police officers to appear at Carter's trial ten days later. No subpoena was issued for Elam, nor were other efforts made to secure his attendance. On April 23, Carter's trial was continued from April 24 to September 25, 1986. The next day, the Commonwealth filed an ex parte petition, pursuant to Tennessee's Uniform Non-Resident Witness Act, to secure the attendance of Elam for the purpose of deposing him May 15, 1986. The court granted the petition within a day. There was no deposition on May 15. Instead, the Commonwealth filed another ex parte petition, this time pursuant to Oklahoma's Uniform Non-Resident Witness Act, to

secure Elam's presence in Kentucky to depose him June 30. The petition was granted the same day.

On June 5, the prosecutor wrote Carter's counsel, Louis Waller, notifying him of Elam's deposition on June 30 and stating that the "deposition will be read at [Carter's] trial" in September. According to Waller's statement at the June 30 deposition, he did not receive the notice until June 20. He then sent a letter to Carter, informing him of the deposition and stating "you may wish to be present." Waller received no response to the letter or to several subsequent phone calls made prior to the deposition. The trial court specifically found there was "no evidence that [Carter] had notice that he was suppose [sic] to be there."

The deposition was held as scheduled June 30. Waller appeared, but told the prosecutor that he could not effectively represent Carter without his presence. He further indicated that

he intended to withdraw from the case. He then left the deposition, but not before pointing out to the prosecutor that if Elam could be compelled to come to Kentucky for a deposition, there was no reason why he could not be present for trial in September. The prosecutor proceeded to depose Elam in the absence of petitioner and his counsel, and without any cross-examination. Two days after the deposition, the Commonwealth moved for a ruling on the admissibility of the deposition at trial in lieu of live testimony.

In preparation for the new September 25 trial date, the Commonwealth issued subpoenas for seven witnesses September 8. Elam was not among them. The court having granted Waller's motion to withdraw, new counsel was appointed for Carter September 9. The following day, the court continued the trial to January 5, 1987. Approximately one week later, Carter's new

counsel moved to quash Elam's deposition, on the grounds that Carter was denied his constitutional right to confront his accuser at the deposition. The motion was not denied until trial, almost four months later.

On December 18, 1986, less than three weeks prior to trial and more than five months after Elam's deposition, the prosecutor wrote Elam in Oklahoma notifying him of the new trial date and stating he "would like for [him] to come back to Kentucky in order to testify in person." On the same day, the prosecutor wrote the Logan Circuit Court Clerk, asking that a subpoena be issued for Elam. The letter to Elam was returned to the prosecutor because of an expired forwarding order, and the subpoena was issued bearing the same address, but was not served. The prosecutor made a one-minute phone call to Oklahoma December 26, a four-minute phone call to Union City, Tennessee December 31, and four

days prior to trial, on January 2, 1987, nine phone calls to Oklahoma lasting a total of sixteen minutes, in an effort to locate Elam.[1]

The trial commenced January 6, 1987. Immediately prior to trial, Carter's counsel stated on the record that although his motion to quash Elam's deposition had been argued, it had not been transcribed, and he reiterated his objections to its admission. He argued that the absence of Carter at Elam's deposition denied him his right to confront his accuser. He also emphasized to the court that the Commonwealth had used the Uniform Non-Resident Witness Act to procure Elam's attendance at his deposition, but had not made a similar effort to obtain his

---

[1] The phone bill listing these calls appeared in the prosecutor's Motion to Supplement, filed one month after Carter's trial. The identities of the parties called were not given.

presence at trial. The motion was overruled and the deposition was read as the Commonwealth's first witness. One of the police officers also testified concerning what Elam had told him prior to taking them to Kentucky to show them the trailer. The trial court overruled petitioner's objection to introduction of this hearsay testimony.

The jury found Carter guilty of possession of marijuana and trafficking in LSD, and of being a first degree persistent felony offender. Carter appealed. The Kentucky Supreme Court upheld his substantive convictions, but reversed his first degree persistent felony offender conviction due to insufficient evidence. Carter v. Commonwealth, 782 S.W.2d 597, 602 (Ky. 1989). After his petition for writ of certiorari to the United States Supreme Court was denied, 497 U. S. 1029 (1990), Carter filed a petition for writ of

habeas corpus in the district court, which was denied November 1, 1991. Carter filed a Motion for Certificate of Probable Cause in this Court March 10, 1992, which we granted April 15, 1992.

II.

Petitioner's claims on appeal all revolve around Elam's testimony. Petitioner asserts that the prosecutor's decision to continue Elam's deposition after the departure of petitioner's attorney denied him his Sixth Amendment right to counsel, and his right under the Fifth, Sixth and Fourteenth Amendments to be present at all critical stages of the proceeding against him. Petitioner further contends that the failure of the trial court to suppress the deposition at trial violated his Sixth Amendment right to confront his accuser, due both to the Commonwealth's lack of a good-faith effort to obtain Elam's presence at trial and due to the inherent unreliability of a deposition not

subjected to cross-examination. Finally, he asserts the admission of Elam's hearsay statements through the officer's testimony at trial was reversible, not harmless, error. We review de novo a district court's refusal to grant a habeas petition, and the district court's factual determinations are reviewed under the clearly erroneous standard. McCall v. Dutton, 863 F.2d 454, 459 (6th Cir. 1988), cert. denied, 490 U.S. 1029 (1989). We defer to state court findings if supported by the evidence. Lundy v. Campbell, 888 F.2d 467, 469 (6th Cir. 1989), cert. denied, 495 U.S. 950 (1990).

The Sixth Amendment on its face guarantees a criminal defendant the right "to be confronted with the witnesses against him." The Supreme Court has recognized that this language "comes to us on faded parchment ... with a lineage that traces back to the beginnings of Western culture." Coy v. Iowa, 487 U.S. 1012, 1015

(1988). "The Confrontation Clause provides two types of protection to the criminal defendant: the right physically to face those who testify against him, and the right to conduct cross-examination." Pennsylvania v. Ritchie, 480 U.S. 39, 51 (1987). Both protections are crucial. "There is something deep in human nature that regards face-to-face confrontation between accused and accuser as 'essential to a fair trial in a criminal prosecution.'" Coy, 487 U.S. at 1017 (quoting Pointer v. Texas, 380 U.S. 400, 404 (1965)). Similarly, the Confrontation Clause "forces the witness to submit to cross-examination, the 'greatest legal engine ever invented for the discovery of truth,'" California v. Green, 399 U.S. 149, 158 (1970) (quoting 5 J. Wigmore, Evidence § 1367, (3d ed. 1940)).

Against this backdrop, the absence of Carter's counsel during Elam's deposition

demands close scrutiny. As the Supreme Court stated in United States v. Cronic, 466 U.S. 648 (1984):

> [I]f counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable.... The Court has uniformly found constitutional error without any showing of prejudice when counsel was either totally absent, or prevented from assisting the accused during a critical stage of the proceeding.

Id. at 659 & n. 25. In Green v. Arn, 809 F.2d 1257 (6th Cir.), vacated on other grounds, 484 U.S. 806 (1987), reinstated, 839 F.2d 300 (6th Cir. 1988), cert. denied, 488 U.S. 1034 (1989), this court had the opportunity to apply Cronic in a situation where defense counsel absented himself from petitioner's trial while the prosecution was presenting its case. Counsel for two other defendants in the case was present, and conducted cross-examination of the

state's first witness. Nevertheless, we found that petitioner's rights under the Confrontation Clause had been violated by the absence of her counsel during this critical stage of the proceeding:

> It is difficult to perceive a more critical stage of a trial than the taking of evidence on the defendant's guilt.... The absence of counsel during the taking of evidence on the defendant's guilt is prejudicial per se and justifies an automatic grant of the writ "without any opportunity for a harmless error inquiry." Siverson v. O'Leary, 764 F.2d 1208, 1217 [&n.6] (7th Cir. 1985).

Id. at 1263.

This case is similar to Green. It is undisputed that Elam's videotaped testimony was the sole evidence supporting Carter's conviction for the drug offenses of November 3, 1985. Although Lt. Ken Rieger was present to be cross-examined at trial, his information concerning the November 3 transactions came entirely from discussions with Elam. He did not

travel to Kentucky until November 5. The taping of the deposition was, for all practical purposes, the only time "evidence on the defendant's guilt" was taken. The unmitigated absence of cross-examination at this time meant that Elam's testimony was never subjected to "the crucible of meaningful adversarial testing," Cronic, 466 U.S. at 656. Of course, Green is distinguishable on its facts; the absence of Green's counsel occurred at trial, rather than at a pre-trial deposition. We do not explicitly extend today the holding in Green to cover pre-trial depositions as well as trials, however similar the impact on the defendant's Confrontation Clause rights. But our reasoning in Green supports our conclusion here that Elam's videotaped deposition was hearsay, and was improperly admitted under the

"unavailable witness" exception, Ky. R. Evid. 804 (Baldwin 1992).[2]

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2 Ky. R. Evid. 804 states in relevant part:

Hearsay exceptions: declarant unavailable

> (a) Definition of unavailability. "Unavailability as a witness" includes situations in which the declarant:
> ...
> (5) Is absent from the hearing and the proponent of the statement has been unable to procure the declarant's attendance by process or other reasonable means.
> ...
> (b) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
> (1) Former testimony. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

Ky. R. Evid. 804 is substantially identical to Fed. R. Evid. 804, lacking only the residual hearsay exceptions permitted by subsection (5) of the federal Rule. In Ohio v. Roberts, 448 U.S. 56 (1980), the Supreme Court set forth the standard to be applied in defending this hearsay exception against Confrontation Clause claims:

> In sum, when a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then, his statement is admissible only if it bears adequate 'indicia of reliability.' Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness.

Id. at 66. In Barber v. Page, 390 U.S. 719, 724-25 (1968), the Court articulated the burden which must be met by the Commonwealth to satisfy the "unavailability" prong of the foregoing test: "a witness is not 'unavailable' ... unless

the prosecutorial authorities have made a good-faith effort to obtain his presence at trial." The test for review of compliance with this standard defies precise explication: "The lengths to which the prosecution must go to produce a witness ... is a question of reasonableness." Ohio v. Roberts, 448 U.S. at 74 (citing California v. Green, 399 U.S. at 189, n.22 (concurring opinion)).

We find it unnecessary to reach the issue of whether the Commonwealth's attempts to secure Elam's attendance at trial satisfy the good-faith effort test enunciated in Barber, however, because we hold that Elam's deposition, taken in violation of Carter's rights under the Confrontation Clause, could not satisfy the "other adequate indicia of reliability" standard imposed by the unavailable witness exception to the hearsay rule. Elam was not forced to confront Carter as he gave his deposition. He

was not cross-examined. These circumstances could not provide the trier of fact with "a satisfactory basis for evaluating the truth of the prior statement." Dutton v. Evans, 400 U.S. 74, 89 (1970).

The Commonwealth argues that the Ohio v. Roberts test is met in this case, because Elam's deposition was admitted under a "firmly rooted hearsay exception," 448 U.S. at 66, namely Ky. R. Crim. Proc. 7.20(1), which provides in relevant part:

> At the trial or upon any hearing, a part or all of a deposition, so far as otherwise admissible under the rules of evidence, may be used if it appears: ... that the witness is out of the Commonwealth of Kentucky, unless it appears that the absence of the witness was procured by the party offering the deposition; or ... that the party offering the deposition had been unable to procure the attendance of the witness by subpoena.

(emphasis supplied). This argument is without merit. As the emphasized portion of the

preceding text shows, the rule governs production of evidence subject to the rules of evidence. Hearsay evidence from unavailable witnesses is governed by Ky. R. Evid. 804(b)(1), which includes the requirement that the party against whom the testimony is now offered had a prior "opportunity and similar motive to develop the testimony by direct, cross, or redirect examination." But this is the very opportunity that was denied to Carter. The requirements of the exception are not met.

The Commonwealth contends that Carter waived his Sixth Amendment rights through his failure to attend the deposition after his attorney sent him written notice and tried to contact him several times by phone. It is not clear why this assertion, if true, would overcome the reliability problem with the deposition. Furthermore, we disagree with the premise. Waiver of the right to confront one's accuser is

evaluated according to the standards for waiving any constitutional right as enunciated in Johnson v. Zerbst, 304 U.S. 458, 464 (1938), and requires "an intentional relinquishment or abandonment of a known right or privilege." The right "may be waived only by voluntary and knowing action." Boyd v. Dutton, 405 U.S. 1, 2-3 (1972). The trial court found that there was no evidence that Carter ever received the letter from his attorney concerning the deposition, and that finding is presumed correct. 28 U.S.C. §2254(d). Furthermore, the letter, even if received, did not inform Carter of his constitutional right to attend, nor did it urge him to exercise that right ("you may wish to be present") (emphasis supplied). Most importantly, the letter did not provide Carter with any notice of the consequences if he failed to appear -- that his attorney would leave the deposition and permit the state's key witness to

be deposed without any cross-examination whatsoever. Although a waiver may be implied and not express, there must be evidence in the record to support that implication. This court's statement in Evans v. United States, 284 F.2d 393 (6th Cir. 1960) is directly applicable: "the record does not show that defendant knew or was advised of his rights. In order to constitute a waiver, there must be a voluntary relinquishment of a known right." Id. at 395. We find Carter did not personally waive his right to confront Elam.

The district court found that Carter nonetheless effected a waiver of this right through the actions of his attorney, who appeared for the deposition and then departed. We find this conclusion inconsistent with Zerbst. As the Second Circuit stated in United States v. Crutcher, 405 F.2d 239, 243 (2d Cir. 1968), cert. denied, 394 U.S. 908 (1969),

referring to defense counsel's decision to proceed with jury impanelling in the defendant's absence: "[E]ven assuming [counsel] had the authority to act as Payne's counsel, he would not have the ability to bind Payne to a decision of this type without obtaining Payne's consent." The Tenth Circuit came to a similar conclusion in Larson v. Tansy, 911 F.2d 392, 396 & n.2 (10th Cir. 1990):

> The record indicates defendant's counsel, and not defendant, waived defendant's right of presence at trial. The trial court never directly addressed defendant concerning his counsel's request to conduct the remainder of the trial in defendant's absence. We hold that defendant did not waive his right to be present.... Even if defense counsel could have validly waived defendant's right to be present for the conclusion of his trial, where defense counsel did not consult with defendant concerning the waiver and did not obtain defendant's consent, the waiver will not be binding on defendant.

We similarly find that, even if Waller's actions at the deposition could constitute a waiver of

the defendant's rights under the Confrontation Clause, the waiver would not bind Carter in the absence of a showing that he consented.[3] As

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[3] The Kentucky Supreme Court found that "Carter's right to confront Elam at the deposition was waived" because "[a]mple notice of the deposition was provided to Carter's counsel ... There was no evidence that Carter, personally, had a legal reason why he was unable to attend, and no proof that his presence would have made a difference." Carter, 782 S.W.2d at 599. This obviously conflicts with our reading of Zerbst. Moreover, the Kentucky Supreme Court made statements in an opinion decided the same day, Dean v. Commonwealth, 777 S.W.2d 900 (Ky. 1989), that would lead to precisely the opposite result from that reached in Carter:

> We hold that because the right to be present and to confront is personal to the accused under Section 11 of the Kentucky Constitution, and more particularly under [Ky. R. Crim. Proc.] 7.12, only the defendant can waive this right. The waiver must be sufficiently clear "as to indicate a conscious intent." Powell v. Commonwealth, 346 S.W.2d 731, 734 (1961).... [A]ppellant's counsel waived appellant's right to be present at the depositions of the two prosecution witnesses. There is no

the Supreme Court stated in Faretta v. California, 422 U.S. 806, 819 (1975): "It is the accused, not counsel, who must be 'informed of the nature and cause of the accusation,' who must be 'confronted with the witnesses against him' .... The right to defend is given directly to the accused; for it is he who suffers the consequences if the defense fails."

We address finally the argument advanced by the Commonwealth that our ruling today will give

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> indication in the record that it was appellant's conscious intent to waive this right and his consequent right to cross-examination. Counsel's waiver being ineffective, there was no waiver.... Appellant was not present; nor was he afforded the right to confront and cross-examine the witnesses called to testify against him.

Id at 903. We can discern no reason why a different standard was used in deciding Carter's fate.

every defendant's lawyer the power to obtain habeas relief for a client, merely by neglecting to inform the client of opportunities to confront his accusers. We rejected this argument in Martin v. Rose, 744 F.2d 1245 (1984), and see no reason to depart from our reasoning in that case:

> [W]e are unwilling to assume that members of the bar will cold-bloodedly adopt [such a] bizarre and irresponsible stratagem.... If such a tactic develops, the trial court must respond, but it is not helpless before an attorney's [tactics].... [T]he court's contempt power or the disciplinary mechanism of the bar may be appropriately invoked.

Id. at 1251-52.

III.

Carter had the right to confront Elam, his accuser. Denial of that right without a valid waiver rendered Elam's deposition unreliable for purposes of admissibility at trial over a hearsay objection. Because Carter's conviction

was based solely on Elam's testimony, the error was not harmless. We therefore REVERSE the decision of the district court, and GRANT the petition for writ of habeas corpus.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
No. 91-6419

CLAUDE EARN CARTER, Petitioner-Appellant	)	
v.	)	O R D E R
DEWEY SOWDERS, WARDEN, NORTHPOINT TRAINING CENTER, Respondent-Appellee	)	

Before: MERRITT, Chief Judge; KEITH and SUHRHEINRICH, Circuit Judges

The Kentucky Attorney General's petition to rehear this habeas appeal is denied. The entire thrust of the petition is that petitioner Carter had notice of the deposition used in substitution for live testimony at Carter's criminal trial and that Carter knowingly waived his right of confrontation. This one point is repeated time and again for fifteen pages. The problem with this repeated point is that the

record demonstrates that it is simply factually inaccurate, as our previous opinion concludes, and as the state trial judge flatly found as a fact. The state trial judge found that there is no evidence that [Carter] failed to show for the deposition in this case. There is no evidence that he had notice he was supposed to be there. This Court is not empowered to set aside the reasonable factual findings of the Kentucky trial court, undisturbed by the state appellate courts. Thus the only significant evidence at Carter's criminal trial was a deposition of Carter's chief accuser, a deposition Carter had no notice of. Under the Confrontation Clause live testimony subject to cross-examination is required in order to convict in such a case.

Accordingly, the petition to rehear is DENIED.

ENTERED BY ORDER OF THE COURT

_____

Leonard Green, Clerk

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT BOWLING GREEN

CLAUDE EARN CARTER
Plaintiff

v. No. 90-0197BG(M)

DEWEY SOWDERS, Warden
Defendant

MAGISTRATE JUDGE'S REPORT

This habeas corpus petition is before the Court on the respondent's motion to dismiss or, in the alternative, for summary judgment (docket no. 5) and the petitioner's cross-motion for summary judgment (docket no. 9). The petition requires an analysis of whether the petitioner was denied the right to confront one of the witnesses against him and whether he was denied the right to counsel at a critical stage of the proceeding against him. Because the petitioner was not denied his Sixth Amendment right to

confrontation and because he was represented by counsel, he is not entitled to the writ.

The petitioner was indicted in Logan County, Kentucky, on several drug charges. Following trial, a jury found him guilty of possession of more than eight ounces of marijuana and possession of LSD. The jury fixed the petitioner's sentence on the LSD charge at the maximum of ten years and on the marijuana charge at the maximum of five years. The jury also found the petitioner guilty of being a first degree persistent felony offender and enhanced each of his sentences to thirteen years.

The petitioner challenges his convictions of possession of marijuana and possession of LSD. He claims that the convictions are constitutionally invalid because they were based upon evidence from a witness whom he was denied the right to confront. Specifically, he claims that a video deposition of a police informant

was wrongfully admitted at his trial because there was no showing that the deponent was "unavailable" for trial and the deposition lacked any "indicia of reliability" because the deponent was not tested by cross-examination. Thus, he claims, his right to confrontation of a witness against him as guaranteed by the Sixth Amendment to the United States Constitution was violated.

The testimony of which the petitioner complains was that of Charles Elam. The petitioner labels Elam a "paid police informant." The respondent labels him a "salaried narcotics agent with the Dyersburg Tennessee Police Department."

Prior to trial, the Commonwealth had deposed Elam. The deposition was necessary, according to the Commonwealth, because Elam was a Tennessee resident and the Commonwealth lacked the power to insure his attendance at the

petitioner's trial in Kentucky. The petitioner's counsel appeared at the deposition, but the petitioner did not. His attorney stated that he had written to the petitioner on June 20, 1986, advising him, "you may wish to be present," and had made other efforts to contact the petitioner, to no avail.

Counsel stated at the deposition that he had moved the Court to withdraw as the petitioner's counsel and did not plan to remain for the deposition because, without the petitioner's presence, he could not effectively represent him. After the petitioner's counsel departed, the Commonwealth deposed Mr. Elam. Because neither the petitioner nor his counsel was present, Mr. Elam was not cross-examined.

The video deposition was introduced at trial over the petitioner's objection. In essence, Elam's testimony was that he met the petitioner at a trailer where approximately 100 pounds of

marijuana was located, the petitioner "fronted" Elam and another person ten bags of marijuana, and he sold Elam eight "hits" of LSD.

ANALYSIS

The petitioner argues that he was denied the right to confront Elam at the deposition. The deposition was, therefore, inadmissible at trial and his conviction based upon the deposition, accordingly, was constitutionally tainted.

The Sixth Amendment's Confrontation Clause, made applicable to the States through the Fourteenth Amendment, Pointer v. Texas, 380 US 400, 403-405, 13 L.Ed.2d 923, 85 S.Ct. 1065 (1965), provides: "In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." Nearly one hundred years ago the Supreme Court stated that:

> The primary object of the [Confrontation Clause of the Sixth Amendment] ... was to prevent

> depositions or ex parte affidavits ... being used against the prisoner in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief." Mattox v. United States, 156 US 237, 242-243, 39 L.Ed.2d 409, 411, 15 S.Ct. 337 (1895).

The Confrontation Clause restricts the admissibility of evidence in two ways, both of which the petitioner claims were violated at his trial. First, if the prosecution does not produce at trial the declarant whose statement it wishes to use against the defendant (thus denying the defendant the right to confront him) it must demonstrate the "unavailability" of the declarant. If the declarant is not produced and the prosecution fails to show that he is unavailable, the evidence is not admissible.

Barber v. Page, 390 U.S. 719, 20 L.Ed.2d 255, 88 S.Ct. 1318 (1968).

Second, even upon showing that the absent witness is "unavailable", the evidence is admissible only if it bears "adequate indicia of reliability." Ohio v. Roberts, 448 U.S. 56, 100 S.Ct. 2531, 2539, 65 L.Ed.2d 597 (1980).

If Elam was not "unavailable" or if the assertions in his deposition did not bear "adequate indicia of reliability", the evidence violated the Confrontation Clause. The magistrate judge will first address whether the prosecution demonstrated that Elam was "unavailable."

The Kentucky Supreme Court, in addressing whether the prosecution made a good faith effort to locate Elam for attendance at trial, did not recite the prosecution's efforts. Rather, the court held that such a determination is "addressed to the sound discretion of the trial

court." The court held that the trial court had not abused its discretion in finding that Elam was "unavailable" for trial.

Contrary to the respondent's argument, this finding is not entitled to a presumption of correctness under 28 U.S.C. §2254(d). Sumner v. Mata, 455 U.S. 591, 102 S.Ct. 1303, 71 L.Ed.2d 480 (1982). It is, instead, a mixed question of fact and law that is to be reviewed de novo. Clark v. Jago, 676 F.2d 1099, 1110 n.15 (6th Cir. 1982).

The petitioner states in his summary judgment motion, and the respondent does not dispute, that the prosecution made the following attempts to make Elam "available" for trial. On December 18, 1986, nineteen days prior to trial, the prosecutor sent a letter to Elam in Oklahoma notifying him of the January 6, 1987, trial date and stating he "would like for [him] to come back to Kentucky in order to testify in

person." (TR I 108). The letter was returned to the prosecutor on December 23 indicating Elam's forwarding order had expired. Also on December 18, 1986, the prosecutor wrote to the Logan Circuit Court Clerk asking him to issue a subpoena for Elam. (TR I 146-147). The subpoena was issued on December 24, 1986, and mailed to the same Oklahoma address. The prosecutor made telephone calls to Little Caesar's Bar in Oklahoma City where Elam allegedly worked, to Little Caesar's main office, to other stores in the Oklahoma City area, and to the Union City, Tennessee Police Department in an attempt to locate Elam. (TR I 105-107, 145; TR II 78-88).

On April 14, 1986, the Commonwealth subpoenaed three Kentucky police officers to appear at the April 24 trial. No subpoena was issued for Elam, nor was any other effort made

to apprise him of the trial or request his presence.

On April 23, 1986, the trial was continued until September 25, 1986. On April 24, 1986, the Commonwealth filed an ex parte petition, pursuant to Tennessee's Uniform Non-Resident Witness Act, to secure the attendance of Elam for purposes of deposing him on May 15, 1986. The petition was granted.

On May 15, 1986, the Commonwealth filed another ex parte petition, this time pursuant to Oklahoma's Uniform Non-Resident Witness Act, to secure Elam's presence in Kentucky for a deposition on June 30, 1986. That petition was also granted.

Additionally, the Kentucky Supreme Court found that:

> Elam was asked on deposition where he would be 'come September of this year when this case comes to trial', to which he replied, vaguely, 'Honestly I

can't say, but I hope to be back in Oklahoma.'
Carter v. Commonwealth, Ky., 782 S.W.2d 597, 599 (1990).

The petitioner argues that the prosecution did not make a good-faith effort to procure Elam to testify at trial. If the prosecution had intended to produce Elam at trial, the petitioner argues, it would have obtained a subpoena for him when the subpoenas for other witnesses were issued and it would have subpoenaed him for trial at the time that it subpoenaed him for deposition. He also argues that the prosecution's failure to use the Kentucky Uniform Non-Resident Witness Act, KRS 421.250, to procure Elam for trial further supports the allegation that the prosecution did not make a good faith effort to produce Elam.

It does appear that the prosecution initially may have been concerned more with deposing Elam and presenting his deposition

attrial rather than assuring that Elam would personally appear. This may have been because the prosecution feared that it would not be able to locate Elam in order to subpoena him at the time of trial or it may have been to accommodate Elam's apparent desire that he not have to return to Kentucky because he was afraid of the petitioner. The question is, however, whether there was a good faith effort to locate Elam for trial. The magistrate judge finds that there was. The efforts made are noted above. That little effort was made prior to the earlier trial dates does not detract from the attempts to locate Elam prior to the ultimate date on which the trial was held. The petitioner's arguments that the prosecution did not subpoena Elam for trial and did not utililze the non-resident witness act are not persuasive. In order to do either, the prosecution would have to know Elam's location. The prosecution

asserted that it did not know where to find Elam and there is no evidence in contradiction. Further, the prosecution could not have served upon Elam at the deposition a subpoena to appear at trial because such service is prohibited by KRS 421.260 (a person is not subject to subpoena for trial when he was present in the jurisdiction only by reason of a court order to attend and testify by deposition). Having found that Elam was unavailable, we turn to whether his testimony through deposition bore "adequate indicia of reliability."

The Kentucky Supreme Court did not directly address whether the testimony met the "adequate indicia of reliability." Rather, it relied on RCr 7.20 which "authorizes the use of a deposition in appropriate circumstances relating to unavailability, as specified therein." Carter, id. at 600. As noted above, the "adequate indicia of reliability" issue is an

integral part of determining whether the requirements of the confrontation clause were met. The issue was presented for the Kentucky Court's consideration. That the Court did not address it does not constitute a failure to exhaust his remedies as to that issue. We, therefore, will consider the issue.

As previously noted, the deposition was admissible at trial only if the evidence presented bore "adequate indicia of reliability." Ohio v. Roberts, 448 U.S. 56, 100 S.Ct. 2531, 2539, 65 L.Ed.2d 597 (1980). The petitioner argues that there was no indicia of reliability because the deposition was hearsay evidence and because the deposition was improperly conducted without either himself or his attorney present.

The deposition was not hearsay evidence. Rather, it was properly admissible pursuant to FRCP 804 "Hearsay Exceptions; Declarant

Unavailable." The rule provides in pertinent part:

> (b) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> (1) Former testimony. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

Here, Elam's deposition was taken in the course of the proceeding against the petitioner and the petitioner, through his attorney, had the opportunity to cross examine him. The petitioner argues that there is no evidence that he personally had notice of the deposition and that he could not, accordingly, have waived his right to examine Elam when he did not know that the deposition was to take place. He argues

that "clearly" due to his absence at the deposition, he was denied his right of an opportunity to cross examine Elam.

The petitioner's arguments miss the mark. His attorney was present at the deposition. He stated that he had written the petitioner advising him that he "may wish to be present" at the deposition. The petitioner does not state whether he received the letter of his attorney. Instead, he argues that there is no evidence in the record that he did. Indeed, the trial court found that there was no such evidence and that finding is presumed correct. 28 USC 2254(d). Whether the petitioner received the notice is not dispositive of the matter. His attorney was present at the deposition. The petitioner argues that "once the prosecutor was on notice that Petitioner's counsel intended to withdraw, he should have postponed the deposition until it was clear that Petitioner was represented by

counsel." This is the basis for the petitioner's assertion that he was denied counsel at a critical stage of the proceedings. Although the petitioner's counsel indicated that he had moved to withdraw from representing the petitioner, the motion had not been ruled upon by the Court. Until his motion was granted, it was clear that he was, nonetheless, the petitioner's attorney. As the petitioner's attorney, he had the opportunity to cross examine Elam or to waive cross examination on behalf of the petitioner. The attorney did not request that the deposition be postponed nor did he object to its occurrence. The opportunity to challenge Elam's testimony was there. The plaintiff, through his attorney, chose not to take advantage of it.

In Idaho v. Wright, 497 U.S. ___, 110 S.Ct. 3139, 3146, 111 L.Ed.2d 638 (1990), the Supreme Court held that the reliability of evidence

presented by an unavailable witness can be inferred without more where the evidence falls within a firmly rooted hearsay exception. The evidence produced at trial through the video deposition of Elam falls within FRCP 803(b)(1). It was properly admitted at trial as an exception to hearsay.

RECOMMENDATION

The Magistrate Judge RECOMMENDS that the petition for writ of habeas corpus be DENIED.

Date: August 25, 1991

/s/W. David King
W. DAVID KING
United States Magistrate Judge

NOTICE

Pursuant to Title 28 USC §636 and Rule 6(e) of the Federal Rules of Civil Procedure, the parties shall have thirteen (13) days from the date of service to file written objections to the foregoing report with the Clerk of the Court. A copy of the objections shall be served

on the undersigned at P.O. Box 826, Paducah, Kentucky 42002-0826. Failure of a party to file timely objections shall constitute a waiver of the right to appeal by that party. Thomas v. Arn, 474 U.S. 140, 106 S.Ct. 466, 88 L.Ed.2d 435 (1985), reh. den. 474 U.S. 1111, 106 S.Ct. 899, 88 L.Ed.2d 933 (1986).

Date of Service: September 5, 1991

/s/ W. David King
W. DAVID KING
United States Magistrate Judge

Copies to
Ms. Namkin
Ms. Ullerich

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT BOWLING GREEN

CLAUDE EARN CARTER
Plaintiff

v. No. 90-0197BG(M)

DEWEY SOWDERS, Warden
Defendant

ORDER AND JUDGMENT

This matter having been considered by U.S. Magistrate Judge W. David King; it appearing that the Magistrate Judge has filed his report and that written objections have been filed to the Magistrate Judge's report; the Court having considered de novo those portions of the Magistrate Judge's report to which objection is made; the Court having determined that the Magistrate Judge's report should be accepted in whole and the Findings of Fact and Conclusions

of Law should be fully incorporated by reference herein; and the Court being sufficiently advised.

It is hereby ORDERED and ADJUDGED:

1. The petition for writ of habeas corpus is DENIED.

2. This is a final and appealable Order and there is no just cause for delay.

Date: October 31, 1991

/s/Ronald E. Meredith
RONALD E. MEREDITH
Judge, U.S. District Court

Copy to
Namkin
Ullerich
Judge King

The deposition of CHARLES EDWARD ELAM, JR., taken pursuant to notice heretofore filed, in the offices of Jesse L. Riley, Jr., Attorney at Law, Kirkpatrick Building, Russellville, Logan County, Kentucky, on Monday, June 30, 1986, at approximately 10:15 A.M., and to be used in accordance with the Kentucky Rules of Civil Procedure

*** *** *** ***

A P P E A R A N C E S

For the Plaintiff:	Jesse L. Riley, Jr. Kirkpatrick Building Russellville, KY 42276 (502) 726-7554
For the Defendant:	Louis M. Waller P.O. Box 32 139 West Fourth Street Russellville, KY 42276
Also Present:	Benny Bowles and Donna Riley

*** *** *** ***

MR. RILEY: This is the deposition of Charles Edward Elam, Jr., being taken pursuant

to order of Logan Circuit Court entered on or about April 2nd, 1986, which has been marked as Plaintiff's Exhibit 1 and pursuant to notice to take depositions which has been marked Plaintiff's Exhibit Number 2; which notice shows it was forwarded to attorney for Claud Carter and attorney for the other defendant, namely Mr. Louis Waller and Mr. T.A. Noe.

Mr. Waller, I understand that you like, would like to make a statement at this time since Mr. Carter is not present.

MR. WALLER: Yes, I would. I was apprised of the possibility that this deposition would take place on, or about June 20th. At that time I had matters scheduled for District Court, and I was advised by the Commonwealth Attorney that the deposition would take place. I told him that I would try to rearrange schedule in District Court. Commonwealth Attorney at that time was uncertain as to whether or not Mr. Elam

would be present. I told him I would try to be present, and I have done that this morning by restructuring my schedule in District Court.

But my problem is that I have been unable to locate Mr. Carter. Now, shortly after receiving notice from Mr. Riley that the deposition was to take place and on June 20th, 1986, I addressed the letter to Mr. Claud E. Carter, Route 1, Oldstead, Kentucky. Mr. Carter has no telephone to my knowledge.

The deposition for Charles E. Elam is tentatively scheduled for Jesse Riley's office at 9:30 a.m., Monday, June 30, 1986. Jesse seems uncertain that Elam will show, although he has sent an airplane ticket to Colorado. I have a District Court matter that same morning but will plan to work around it. You may wish to be present.

Now, I called or yesterday I had a discussion with Mr. Carter's sister. And her

name is Mrs. Parker. And when I talked to Mrs. Parker she gave me a number where I might be able to reach Mr. Carter. I told her that I was anxious to reach with him to talk with her about this matter. She gave me the number of one Brenda Houchens, H-O-U-C-H-E-N-S. That number is 726-7994. I tried that number several times. I received no answer. I appeared this morning prepared for the deposition but was aware of the fact that Mr. Carter was not here. And I have tried to reach Mr. Carter at that number, 726-7994.

At Mr. Riley's suggestion I interrupted the line with the operator, advised the operator that it was an emergency. The operator informed me at about ten o'clock that the telephone was out of order, which I assume could probably be established whether it is or is not.

But I have served notice of withdrawl [sic] from the case for the reason that I'm not able

to sit through the deposition and ask the questions that need to be asked and have information from Mr. Clark -- Carter that would be essential for proper representation. I have delivered that to Mr. Riley. So I do not plan to attend the deposition. I have no reluctance to attend. It's simply that I cannot effectively represent Mr. Carter's interest without him being present. And I don't know where he is, whether he had a truck breakdown or some other problem that prevented him from being present.

MR. RILEY: Mr. Waller, I understand that you as Mr. Carter's attorney and continue to be his attorney until you are allowed to withdraw are not going to stay for the deposition? Is that correct?

MR. WALLER: Yes, sir. That's correct.

MR. RILEY: I also believe that in your letter to Mr. Carter you advised him that he could attend if he wanted to.

MR. WALLER: I said, "You may wish to be present." My intention was that when he received that letter that we would discuss the matter further, but we have not been able to do so. No summons or other court process has been issued to compell his attendance, and his attendance is discretionary with him at this point in time.

MR. RILEY: And you are not going to stay while we take Mr. Elam's deposition?

MR. WALLER: I don't believe that it would be fair to Mr. Carter to do that, because I would not be able to effectively ask questions and to interrogate the witness on cross examination.

I previously asked that the witness be present for trial, and we have a trial date in September. And it would seem that if he could be here for this television presentation that he could also be present for the trial at nine

o'clock on September 25th. But I don't know whether or not he could attend that. But it would seem that he could have as well have attended the trial as the deposition.

MR. RILEY: At this time would the court reporter please swear Mr. Elam?

MR. WALLER: Okay. Let the record show that I'm departing for the reasons as I have previously stated.

MR. RILEY: Better take your mike off, Mr. Waller.

MR. WALLER: Okay. Thank you.

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NO. 93-1500

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

DEWEY SOWDERS, WARDEN, PETITIONER,

V.

CLAUDE EARN CARTER, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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APRIL 14, 1994

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QUESTION PRESENTED

WHERE THE ACCUSED IS FREE ON PRE-TRIAL BOND AND ALL LOWER COURTS HAVE AGREED HE DID NOT HAVE NOTICE OF A PRE-TRIAL DEPOSITION OF THE COMMONWEALTH'S KEY WITNESS, CAN THE ACCUSED'S ABSENCE FROM SAID DEPOSITION EQUAL WAIVER OF HIS CONSTITUTIONAL RIGHT OF CONFRONTATION?

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CLAUDE EARN CARTER, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

The respondent, Claude Earn Carter, respectfully requests that this Court deny the petition for writ of certiorari seeking review of the opinion of the United States Court of Appeals for the Sixth Circuit in this case.

OPINION BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported as Carter v. Sowders, Ky. 5 F.3d 975 (6th Cir. 1993), and is attached as part of the respondent's appendix (Appendix hereinafter A 1-8).

JURISDICTION

Respondent contests petitioner's assertion that this Court has jurisdiction over petitioner's petition under 28 U.S.C. §2254(1), and respondent further states that this Court lacks jurisdiction over petitioner's petition under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment of the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him;...and to have the Assistance of Counsel for his defence.

The Fourteenth Amendment to the United States Constitution provides:

> ...No State shall...deprive any person of life, liberty, or property, without due process of law[.]

STATUTORY PROVISIONS INVOLVED

28 U.S.C. §2254(d) provides:

> In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed correct,....
>
> * * *
>
> And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7),

> inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

28 U.S.C. §636(b)(1) provides:

> (B) a judge may also designate a magistrate...to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the court,...of applications for posttrial relief made by individuals convicted of criminal offenses and of prisoner petitions challenging conditions of confinement.
>
> * * *
>
> Within ten days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate. The judge may also receive further evidence or recommit the matter to the magistrate with instructions.

COUNTERSTATEMENT OF THE CASE

On December 27, 1985, the Logan County, Kentucky, Grand Jury

indicted respondent, Claude Earn Carter, for unlawfully possessing more than eight (8) ounces of marijuana on November 5, 1985, for purposes of sale; selling more than eight (8) ounces of marijuana on November 3, 1985; possessing and selling LSD on November 3, 1985; possessing drug paraphanalia; and being a first degree persistent felony offender. (Transcript of Record, hereinafter TR I (Indictment No. 85-CR-072) 1-2). Respondent was arraigned on January 17, 1986, and trial was set for April 24, 1986. (TR I 4).

On March 4, 1986, the Commonwealth of Kentucky, petitioner herein, moved to take a videotape deposition of Charles Elam, Jr., a paid police informant and the key witness against respondent. (TR I 8-9). No specific ground for taking the deposition was given. (Id.). On March 17, 1986, the Commonwealth filed a second motion to depose Elam. (TR I 12-13). Since Elam was a Tennessee resident, it was necessary - according to the prosecutor - for the Commonwealth to depose him now as it lacked the power to ensure his attendance at respondent's trial in Kentucky on April 24, 1986. (Id.). After a hearing on April 2, the Logan Circuit Court sustained the prosecutor's motions to depose Elam. (TR I 13, 26).

On April 14, 1986, the prosecutor subpoenaed three (3) Kentucky Police Officers to appear at respondent's April 24th trial. (TR I 27-29). No subpoena was issued for Elam, nor were any other efforts made to secure his attendance. On April 23, 1986, respondent's trial was continued until September 25, 1986. (TR I 30). The next day, the prosecutor filed an ex parte petition, pursuant to Tennessee's Uniform Non-Resident Witness Act,

to secure the attendance of Elam for purposes of deposing him on May 15, 1986. (TR I 31-32). The trial court granted the Commonwealth's petition the following day. (TR I 33-34).

No deposition was taken on May 15, 1986. Instead, the Commonwealth filed another ex parte petition, this time pursuant to Oklahoma's Uniform Non-Resident Witness Act, to secure Elam's presence in Kentucky for a deposition on June 30, 1986. (TR I 35-36). The trial court granted the Commonwealth's petition on the same date. (TR I 37-38).

On June 5, 1986, the Commonwealth wrote respondent's attorney notifying him that Elam's deposition would be taken on June 30, 1986 and stating the "deposition will be read at [respondent's] trial" in September. (TR I 39). The deposition was held as scheduled on June 30, 1986, in the Office of the Commonwealth's Attorney. (Transcript of Deposition for Plaintiff, hereinafter TDP 2). Respondent's attorney appeared at the deposition, but respondent did not. (TDP 3). Counsel stated he didn't receive the notice of the deposition until June 20, 1986. Counsel wrote to respondent on that date advising him "you may wish to be present" at the deposition and made other efforts to contact respondent, all to no avail. (TDP 3-5).

There is no evidence in the record that respondent ever received this letter or any other notice of the deposition, or that he was aware his counsel would not remain for the deposition if he did not show up at the deposition. Since respondent testified at trial, and the Commonwealth cross-examined respondent, the

Commonwealth had the opportunity to specifically question him on this matter. However, the Commonwealth failed to avail itself of this opportunity.

The trial court specifically found there was "no evidence that [respondent] had notice that he was suppose [sic] to be there [at the deposition]." (TE IV 346).

At trial the Commonwealth introduced, over respondent's objection, Elam's uncross-examined deposition testimony taken in the absence of respondent and his counsel. Based on this deposition, which was the sole evidence of respondent's guilt, the jury found respondent guilty of possession of marijuana over eight ounces and trafficking in LSD and being a first degree persistent felony offender. (TR II 51-56, 58-62).

Respondent appealed his convictions to the Kentucky Supreme Court on the grounds that the introduction of Elam's deposition at his trial violated his state and federal constitutional rights to confrontation, counsel and presence. (TR II 90-94, 96). The Commonwealth did not file a cross-appeal to challenge the trial court's finding that respondent did not have notice of the deposition. CR 76.04. On September 28, 1989, the Kentucky Supreme Court affirmed respondent's substantive convictions but reversed his first degree persistent felony offender conviction due to insufficient evidence. Carter v. Commonwealth, Ky., 782 S.W.2d 597, 602 (1989). The Kentucky Supreme Court denied respondent's petition for rehearing on February 8, 1990.

On May 8, 1990, respondent filed a petition for a writ of

certiorari in this Court, raising the same federal constitutional violations, which was denied on June 28, 1990.

On December 28, 1990, Respondent filed a petition for a writ of habeas corpus in the federal district court pursuant to 28 U.S.C. §2254 alleging the aforementioned federal constitutional violations. On September 3, 1991, the magistrate judge filed his report recommending the petition for writ of habeas corpus be denied. However, in his report, the magistrate judge presumed correct, pursuant to 28 U.S.C. §2254(d), the Kentucky trial court's finding that there was no evidence that respondent ever received the letter of his attorney advising him of the deposition. Petitioner's Appendix, hereinafter PA 46. Respondent filed objections to the magistrate judge's report on September 19, 1991. The Commonwealth did not file any objections to the magistrate judge's report. More specifically, the Commonwealth did not object to the magistrate judge's presumption of correctness as to the Kentucky trial court's finding that there is no evidence in the record that respondent received notice of the deposition. Id.

On November 1, 1991, the district court, stating it had considered de novo those portions of the magistrate judge's report to which respondent Carter had objected, accepted the magistrate judge's report "in whole" and denied the petition for a writ of habeas corpus.

After the district court denied respondent's Application for a Certificate of Probable Cause, respondent filed a motion to alter or amend judgment which was also denied. Respondent then filed a

Motion for a Certificate of Probable Cause in the United States Court of Appeals for the Sixth Circuit which was granted on April 15, 1992.

In a unanimous decision, the United States Court of Appeals for the Sixth Circuit reversed the decision of the district court and granted respondent's petition for a writ of habeas corpus. The Sixth Circuit specifically held that "[b]ecause [respondent] did not waive his constitutional rights under the Confrontation Clause to confront his accuser and subject his testimony to cross-examination, the deposition did not bear adequate indicia of reliability for admission at trial." Carter v. Sowders, 5 F.3d 975, 976, 982 (6th Cir. 1993); PA 2, 26. The Sixth Circuit specifically stated that "[t]he [Kentucky] trial court found that there was no evidence that [respondent] ever received the letter from his attorney concerning the deposition, and that finding is presumed correct. 28 U.S.C. §2254(d)." Id. at 981; PA 21.

Notwithstanding the findings of the Kentucky trial court, the magistrate judge, the district court and the United States Court of Appeals for the Sixth Circuit, the Commonwealth filed a petition for rehearing based on the clearly erroneous assumption that respondent received notice of the deposition. In its December 16, 1993, Order denying the petition for rehearing, the Sixth Circuit stated:

> The entire thrust of the petition is that [respondent] Carter had notice of the deposition used in substitution for live testimony at Carter's criminal trial and that Carter knowingly waived his right of

> confrontation. This one point is repeated time and again for fifteen pages. The problem with this repeated point is that the record demonstrates that it is simply factually inaccurate, as our previous opinion concludes, and as the state trial judge flatly found as a fact. Carter v. Sowders, supra at 982; PA 28-29.

The Commonwealth's petition for writ of certiorari is likewise based on the assumption, which is contrary to the record evidence, that respondent received notice of the deposition.

REASONS FOR DENYING THE WRIT

I.

> THIS COURT LACKS JURISDICTION TO REVIEW THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT BECAUSE THE COMMONWEALTH'S PETITION FOR WRIT OF CERTIORARI FAILED TO COMPLY WITH THE REQUIREMENTS OF SUPREME COURT RULE 14(1)(h) and 14(5).

A. Failure to Comply with Supreme Court Rule 14(1)(h)

The Commonwealth's petition for writ of certiorari asks this Court to review the judgment of the United States Court of Appeals for the Sixth Circuit in the case of Carter v. Sowders, 5 F.3d 975 (6th Cir. 1993). This Court lacks jurisdiction to review this judgment from the United States Court of Appeals for the Sixth Circuit because the Commonwealth failed to comply with the requirements of Supreme Court Rule 14(1)(h).

Under Supreme Court Rule 14(h), the party seeking review in this Court of a judgment "shall" specify all stages of the

proceedings at which the federal question it seeks to be reviewed was raised, how it was raised, and how the courts below ruled upon the question, including specific references to the record to show "the federal question was timely and properly raised."

At no point in its statement of the case does the Commonwealth specify when the federal question it asks this Court to review was presented to either the Kentucky trial court, the Kentucky Supreme Court, the federal district court for the Western District of Kentucky, or the United States Court of Appeals for the Sixth Circuit; nor does the Commonwealth state the "method or manner" this question was raised or how this question was passed upon by either the trial or appellate courts.

Accordingly, this Court lacks jurisdiction to review the judgment of the United States Court of Appeals for the Sixth Circuit because the Commonwealth failed to comply with Supreme Court Rule 14(h).

B. Failure to Comply with Supreme Court Rule 14(5)

This Court lacks jurisdiction to review this judgment from the United States Court of Appeals for the Sixth Circuit because the Commonwealth failed to comply with the requirements of Supreme Court Rule 14(5).

Under Supreme Court Rule 14(5), "[t]he failure of a petitioner to present with accuracy, brevity, and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration will be a sufficient reason for denying the petition."

The Commonwealth's rendition of the facts in its "Question Presented," Statement of the Case, and Reasons for Granting the Writ is inaccurate because it omits the finding of fact by the Kentucky trial court, that was presumed correct pursuant to 28 U.S.C. §2254(d) by the United States District Court for the Western District of Kentucky and the United States Court of Appeals for the Sixth Circuit, that respondent Carter did not have notice he was required to appear at the deposition. PA 21, 45-46. As the United States Court of Appeals for the Sixth Circuit states in its Order denying petitioner's petition for rehearing:

> The entire thrust of the petition is that [respondent] had notice of the deposition used in substitution for live testimony at [respondent's] criminal trial and that [respondent] knowingly waived his right of confrontation. This one point is repeated time and again for fifteen pages. The problem with this repeated point is that the record demonstrates that it is simply factually inaccurate, as our previous opinion concludes, and as the state trial judge flatly found as a fact. The state trial judge found that there is no evidence that [respondent] failed to show for the deposition in this case. There is no evidence that he had notice he was supposed to be there.... Carter v. Sowders, supra at 982; PA 28-29.

The Commonwealth's "Question Presented" assumes respondent had notice of the deposition. But since all courts below have found that respondent did not have notice of the deposition, this Court need not decide how or whether or under what standard respondent could make a knowing an intelligent waiver of something of which he

had no knowledge.

In addition, the Commonwealth omits from its Statement of the Case that the magistrate judge presumed correct the Kentucky trial court's finding that there was no evidence in the record that respondent had notice of the deposition. Petition for Writ of Certiorari, hereinafter PC 9-10; PA 45-46. Likewise, the Commonwealth omits from its Statement of the Case that the United States Court of Appeals for the Sixth Circuit presumed correct the trial court's finding "that there was no evidence that [respondent] ever received the letter from his attorney concerning the deposition." PC 10-11; PA 21.

Then, in the very first sentence of its Reasons for Granting the Writ, the Commonwealth states: "The focus of this petition is whether a criminal defendant who is free on pre-trial bond waives the right to confrontation by not attending a deposition of which he/she has notice." PC 11-12. The Commonwealth goes on to state that "[a]fter being notified of a court-ordered deposition, respondent neither contacted his attorney, nor appeared at the deposition." PC 13-14. The Commonwealth continues its misstatement of the facts when it states: "Having determined respondent was aware of the scheduled deposition...." PC 22.

This Court must proceed to a decision on the basis of the actual facts in the record of the case at bar. Once this Court takes into consideration the actual facts of this case, the Commonwealth's "Question Presented" becomes a hypothetical question because it is not based on the fact situation in the instant case.

Even if this Court were to look at petitioner's hypothetical question presented, said question has already been decided adversely to petitioner in Crosby v. United States, 113 S.Ct. 748, 753 (1993), holding that Federal Rule of Criminal Procedure 43 "prohibits the trial in absentia of a defendant who is not present at the beginning of trial." "[T]he defendant's initial presence serves to assure that any waiver is indeed knowing." Id., 113 S.Ct. at 752.

Accordingly, this Court should deny the Commonwealth's petition for writ of certiorari because the Commonwealth failed to comply with Supreme Court Rule 14(5) by accurately presenting the facts of this case to this Court.

II.

BY FAILING TO OBJECT TO THE MAGISTRATE JUDGE'S REPORT FINDING THAT RESPONDENT DID NOT HAVE NOTICE OF THE DEPOSITION, THE COMMONWEALTH OF KENTUCKY HAS WAIVED ITS RIGHT TO CHALLENGE THAT FINDING OF FACT BEFORE THIS COURT IN ITS PETITION FOR WRIT OF CERTIORARI.

The Kentucky trial judge found "[t]here's no evidence that [respondent] failed to show for the deposition in this case. There's no evidence that he had notice that he was suppose [sic] to be there." (TE IV 346). The Commonwealth of Kentucky did not challenge, in the Kentucky trial court or the Kentucky appellate court, this finding of the trial judge. CR 76.04.

In his report, the magistrate judge stated "the trial court found that there was no such evidence [that respondent had notice of the deposition] and that finding is presumed correct. 28 U.S.C.

§2254(d)." PA 46. The Commonwealth of Kentucky did not file objections with the district judge to this portion of the magistrate judge's report.

28 U.S.C. §636(b)(1) states that any party may file written objections to the magistrate's report within ten days after being served with a copy of the report. A party may file objections if it is aggrieved by any aspect of the magistrate judge's report. A party need not be aggrieved by the magistrate judge's recommended disposition to file objections. "Congress apparently assumed ...that any party who was dissatisfied for any reason with the magistrate judge's report would file objections and those objections would trigger district court review." (emphasis added). Thomas v. Arn, 474 U.S. 140, 106 S.Ct. 466, 473, 88 L.Ed.2d 435 (1985). To avoid waiver, a party must object specifically to proposed magisterial findings. Praylow v. Martin, 761 F.2d 179, 180 n.1 (4th Cir. 1985). This waiver rule applies equally to the Commonwealth (who received a favorable recommendation from the magistrate judge) as well as the criminal defendant (who received an unfavorable ruling from the magistrate judge). Id. Failure to file specific objections constitutes a waiver of any further right of appeal. Thomas v. Arn, supra, 106 S.Ct. at 471.

In the case at bar, the Recommendation of the Magistrate Judge contained the following Notice: "Failure of a party to file timely objections shall constitute a waiver of the right to appeal by that party." PA 48-49. The magistrate's warning even cited Thomas v. Arn, supra. Id. This language was mandatory and explicitly

alerted the Commonwealth to its procedural obligations. See United States v. Schronce, 727 F.2d 91, 94 (4th Cir. 1984).

"The filing of objections to a magistrate's report enables the district judge to focus attention on those issues - factual and legal - that are at the heart of the parties dispute." Thomas v. Arn, supra, 106 S.Ct. at 471. By failing to object to the factfinding of the magistrate judge, which was then adopted "in whole" by the district court, the Commonwealth waived its right to have the district court make a "de novo determination" of that aspect of the magistrate judge's report, i.e., whether respondent received notice of the deposition. 28 U.S.C. § 636(b)(1); Rule 8(b)(4) of the Rules Governing §2254 cases.

In its unanimous opinion reversing the decision of the district court and granting respondent's petition for writ of habeas corpus, the United States Court of Appeals for the Sixth Circuit stated that "[t]he trial court found that there was no evidence that [respondent] ever received the letter from his attorney concerning the deposition, and that finding is presumed correct. 28 U.S.C. §2254(d)." Carter v. Sowders, supra at 981; PA 21.

Under 28 U.S.C. §2254(d) a state court's determination of a factual issue shall be presumed to be correct. This presumption of correctness applies equally to state factfindings favorable to the state as well as the prisoner seeking relief. Craker v. Procunier, 756 F.2d 1212, 1213-1214 (5th Cir. 1985). The burden rests upon the party challenging the state court factfinding "to establish by

convincing evidence that the factual determination by the State court was erroneous." 28 U.S.C. §2254(d). In the case at bar, at no time has the Commonwealth made any effort to establish with any evidence, convincing or otherwise, that the finding of the Kentucky trial court is erroneous.

The Commonwealth would have this Court believe that the burden is on respondent to show that a ruling in respondent's favor is correct. For example, in its petition for writ of certiorari, the Commonwealth states that "[r]espondent has never been required to offer any explanation, compelling or otherwise, for his absence [;....] At a minimum, the Sixth Circuit should have allotted the burden to respondent to prove lack of notice as this was a habeas corpus proceeding [;.... T]he most to which respondent was entitled was a hearing[1] in federal district court to give him yet another opportunity to explain why he did not attend Elam's deposition and why he failed to contact his attorney." PC 23-25. The Commonwealth's statements ignore that respondent testified at trial and thus the Commonwealth had every opportunity to question respondent about whether he received notice of the deposition. Instead, the Commonwealth, contrary to the facts in the record, repeatedly asserts that respondent had notice of the deposition.

In its Order denying the Commonwealth's petition for rehearing, the United States Court of Appeals for the Sixth Circuit

---

[1]. Respondent asked for a hearing in his memorandum of authorities in support of his petition for writ of habeas corpus, but the Commonwealth, in its answer and response to respondent's petition, moved to dismiss or in the alternative for summary judgment.

stated:

> The entire thrust of the petition is that [respondent] had notice of the deposition used in substitution for live testimony at [respondent's] criminal trial and that [respondent] knowingly waived his right of confrontation. This one point is repeated time and again for fifteen pages. The problem with this repeated point is that the record demonstrates that it is simply factually inaccurate, as our previous opinion concludes, and as the state trial judge flatly found as a fact....Carter v. Sowders, supra at 982; PA 28-29.

Just as in its petition for rehearing, the entire thrust of the Commonwealth's petition for writ of certiorari is that respondent "had notice of the deposition used in substitution for live testimony at [his] criminal trial." Id. Because the Commonwealth never objected to the Kentucky trial court's finding of fact that respondent did not have notice of the deposition, nor to the magistrate judge's report presuming this historical fact to be correct, the Commonwealth has waived its right to have this Court review by writ of certiorari its "Question Presented" which assumes, as a condition precedent, that respondent had notice of the deposition.

Accordingly, since the Commonwealth has waived its right to challenge the factfinding of the Kentucky trial court, this Court must deny the Commonwealth's petition for writ of certiorari. Thomas v. Arn, supra.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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EDITOR'S NOTE

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The least well-defined element of a *Rumery* analysis is the consideration of whether enforcement of the agreement will "adversely affect the relevant public interests." *Id.* at 398, 107 S.Ct. at 1195. The majority justices in *Rumery* suggested that this standard can be satisfied if the prosecutor demonstrates that obtaining the release was motivated by an independent, legitimate criminal justice objective. *Id.* at 398, 401–02, 107 S.Ct. at 1195, 1196–97. This does not appear to create a particularly difficult hurdle for the prosecutor to clear. Indeed, the reason proffered by the prosecutor for the release-dismissal agreement in this case—"to aid in the disposition of its heavy case load"—would probably suffice under ordinary circumstances. *See id.* at 401, 107 S.Ct. at 1196 (O'Connor, J., concurring in part and in the judgment) (citing "allocation of criminal justice resources" as a "legitimate criminal justice" concern).

[5, 6] Release-dismissal agreements also can be legitimate criminal justice tools in situations where police misconduct is alleged, but the prosecutor is genuinely unable to ascertain the truth surrounding the allegation. As the Ninth Circuit noted in *Lynch v. City of Alhambra*, 880 F.2d 1122 (9th Cir. 1989), release-dismissal agreements can allow prosecutors to "achieve a rough substantial justice where the 'true' facts of the case are not known" by "allow[ing] everyone to declare the case a draw and go home." *Id.* at 1127 n. 8. Examples of other legitimate criminal justice objectives that come to mind are situations where the cost of prosecution would outweigh the benefit accruing to the public from a conviction; where the strength of evidence of criminal conduct is doubtful even though charges were filed in good faith; where witnesses or evidence are no longer available; where evidence is subsequently discovered that points to the criminal case defendant's innocence; or where criminal charges are not the product of prosecutorial misconduct and both sides benefit substantially from a balanced settlement in the sense that both avoid exposure to potential liabilities and expenses.

Rumery also requires a court reviewing a release-dismissal agreement to weigh or balance the interests on both sides of the issue of enforceability. *Rumery*, 480 U.S. at 392, 107 S.Ct. at 1191; *id.* at 399, 107 S.Ct. at 1195 (O'Connor, J., concurring in part and in the judgment). Therefore, in a case where there existed substantial evidence of police misconduct, a court reviewing the release-dismissal agreement could conclude that the public's interest in vindicating constitutional rights and deterring police misconduct[3] by permitting a specific civil complaint to go forward, despite a release, outweighs a general prosecutorial interest in helping to manage a heavy case load.

III.

For the foregoing reasons, the judgment of the district court is **reversed** and this cause is **remanded** for further proceedings consistent with this opinion. The district court should also reconsider plaintiff's motions to amend his complaint should it conclude that the release is not a bar to plaintiff's action.

Claude Earn CARTER, Petitioner–Appellant,

v.

Dewey SOWDERS, Warden, Northpoint Training Center, Respondent–Appellee.

No. 91–6419.

United States Court of Appeals, Sixth Circuit.

Argued April 23, 1993.

Decided Sept. 27, 1993.

Order Denying Rehearing Dec. 16, 1993.

Federal habeas corpus petitioner's conviction for possession of marijuana and traf-

3. *E.g., Lynch*, 880 F.2d at 1128.

ficking in LSD was affirmed on direct appeal by the Supreme Court of Kentucky, 782 S.W.2d 597. Defendant's petition for writ of habeas corpus was denied by the United States District Court for the Western District of Kentucky, Ronald E. Meredith, Chief Judge. Appeal was taken. The Court of Appeals, Merritt, Chief Judge, held that: (1) admitting videotaped deposition of paid police informant violated petitioner's Sixth Amendment rights; (2) unavailable witness exception to hearsay rule did not apply; and (3) petitioner did not waive right to confrontation by failing to attend deposition or by counsel's appearance at beginning of deposition.

Reversed and petition granted.

1. Habeas Corpus ⇐842

District court's refusal to grant habeas petition is reviewed de novo.

2. Habeas Corpus ⇐846

District court's factual determinations in habeas corpus proceedings are reviewed under clearly erroneous standard.

3. Habeas Corpus ⇐765.1

Court of Appeals defers to state court findings when reviewing decision in federal habeas corpus proceedings if supported by evidence. 28 U.S.C.A. § 2254.

4. Criminal Law ⇐662.30

Admitting video deposition of paid police informant violated defendant's right to confront witness where deposition was taken in absence of both defendant and counsel, and deposition was only evidence supporting conviction. U.S.C.A. Const.Amend. 6.

5. Criminal Law ⇐662.30

Confrontation clause precluded application of unavailable witness exception to hearsay rule to use of videotaped deposition of paid police informant absent other adequate indicia of reliability; informant was not forced to confront defendant as deposition was given and was not subjected to cross-examination. Ky.Rules of Evid., Rule 804; Fed.Rules Evid.Rules 804, 804(a)(5), 28 U.S.C.A.; U.S.C.A. Const.Amend. 6.

6. Criminal Law ⇐662.80

Defendant did not waive right to confront paid police informant by failing to attend informant's videotaped deposition in absence of evidence that defendant received notice of deposition, was informed of constitutional right to attend, urged to exercise that right, or received notice of consequences of failure to appear. U.S.C.A. Const.Amend. 6.

7. Attorney and Client ⇐91

Evidence that defendant consented to not attend videotaped deposition of paid police informant was required to waive right to confront informant, even if defense counsel waived right by appearing and then departing. U.S.C.A. Const.Amend. 6.

Julie Namkin (argued and briefed), Dept. of Public Advocacy, Frankfort, KY, for petitioner-appellant.

Carol C. Ullerich, Asst. Atty. Gen. (argued and briefed), Chris Gorman, Atty. Gen., Frankfort, KY, for respondent-appellee.

Before: MERRITT, Chief Judge; and KEITH and SUHRHEINRICH, Circuit Judges.

MERRITT, Chief Judge.

Claude Earn Carter appeals the denial of his petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner was convicted of possession of marijuana and trafficking in LSD. Central to his conviction was the testimony of Charles Elam, Jr., a paid police informant. Elam's video deposition was taken in the absence of both petitioner and his counsel, and the deposition was later admitted, over petitioner's objection, at trial. Because petitioner did not waive his constitutional rights under the Confrontation Clause to confront his accuser and subject his testimony to cross-examination, the deposition did not bear adequate indicia of reliability for admission at trial. We therefore reverse the district court and grant the petition.

I.

Charles Elam was a salaried narcotics agent with the Dyersburg, Tennessee Police Department, earning $150/week. According to Elam's deposition testimony, Elam and Billy Driskell purchased marijuana and LSD from petitioner at a house trailer in Kentucky on November 3, 1985, and returned to Tennessee. Elam then took a group of Tennessee police officers to Kentucky and showed them the trailer where the drugs were purchased. The trailer was searched under warrant November 5, and Carter was arrested while working in the fields near the trailer. He denied ownership of marijuana found in the trailer, or that he had ever met Elam.

Carter was indicted by the Logan County, Kentucky, Grand Jury on December 27, 1985 for the drug offenses and for being a first degree persistent felony offender. He was arraigned January 17, 1986, and the trial was set for April 24 of that year. In preparation for trial, the Commonwealth moved March 4 to take a videotape deposition of Elam, giving no specific ground. A second motion was filed March 17, this time alleging that a pretrial deposition was necessary, since the Commonwealth could not secure the attendance of Elam, a Tennessee resident, at Carter's trial in Kentucky. The court granted the motion. On April 14, the Commonwealth subpoenaed three Kentucky police officers to appear at Carter's trial ten days later. No subpoena was issued for Elam, nor were other efforts made to secure his attendance. On April 23, Carter's trial was continued from April 24 to September 25, 1986. The next day, the Commonwealth filed an ex parte petition, pursuant to Tennessee's Uniform Non-Resident Witness Act, to secure the attendance of Elam for the purpose of deposing him May 15, 1986. The court granted the petition within a day. There was no deposition on May 15. Instead, the Commonwealth filed another ex parte petition, this time pursuant to Oklahoma's Uniform Non-Resident Witness Act, to secure Elam's presence in Kentucky to depose him June 30. The petition was granted the same day.

On June 5, the prosecutor wrote Carter's counsel, Louis Waller, notifying him of Elam's deposition on June 30 and stating that the "deposition will be read at [Carter's] trial" in September. According to Waller's statement at the June 30 deposition, he did not receive the notice until June 20. He then sent a letter to Carter, informing him of the deposition and stating "you may wish to be present." Waller received no response to the letter or to several subsequent phone calls made prior to the deposition. The trial court specifically found there was "no evidence that [Carter] had notice that he was suppose [sic] to be there."

The deposition was held as scheduled June 30. Waller appeared, but told the prosecutor that he could not effectively represent Carter without his presence. He further indicated that he intended to withdraw from the case. He then left the deposition, but not before pointing out to the prosecutor that if Elam could be compelled to come to Kentucky for a deposition, there was no reason why he could not be present for trial in September. The prosecutor proceeded to depose Elam in the absence of petitioner and his counsel, and without any cross-examination. Two days after the deposition, the Commonwealth moved for a ruling on the admissibility of the deposition at trial in lieu of live testimony.

In preparation for the new September 25 trial date, the Commonwealth issued subpoenas for seven witnesses September 8. Elam was not among them. The court having granted Waller's motion to withdraw, new counsel was appointed for Carter September 9. The following day, the court continued the trial to January 5, 1987. Approximately one week later, Carter's new counsel moved to quash Elam's deposition, on the grounds that Carter was denied his constitutional right to confront his accuser at the deposition. The motion was not denied until trial, almost four months later.

On December 18, 1986, less than three weeks prior to trial and more than five months after Elam's deposition, the prosecutor wrote Elam in Oklahoma notifying him of the new trial date and stating he "would like for [him] to come back to Kentucky in order to testify in person." On the same day, the

prosecutor wrote the Logan Circuit Court Clerk, asking that a subpoena be issued for Elam. The letter to Elam was returned to the prosecutor because of an expired forwarding order, and the subpoena was issued bearing the same address, but was not served. The prosecutor made a one-minute phone call to Oklahoma December 26, a four-minute phone call to Union City, Tennessee December 31, and four days prior to trial, on January 2, 1987, nine phone calls to Oklahoma lasting a total of sixteen minutes, in an effort to locate Elam.[1]

The trial commenced January 6, 1987. Immediately prior to trial, Carter's counsel stated on the record that although his motion to quash Elam's deposition had been argued, it had not been transcribed, and he reiterated his objections to its admission. He argued that the absence of Carter at Elam's deposition denied him his right to confront his accuser. He also emphasized to the court that the Commonwealth had used the Uniform Non-Resident Witness Act to procure Elam's attendance at his deposition, but had not made a similar effort to obtain his presence at trial. The motion was overruled and the deposition was read as the Commonwealth's first witness. One of the police officers also testified concerning what Elam had told him prior to taking them to Kentucky to show them the trailer. The trial court overruled petitioner's objection to introduction of this hearsay testimony.

The jury found Carter guilty of possession of marijuana and trafficking in LSD, and of being a first degree persistent felony offender. Carter appealed. The Kentucky Supreme Court upheld his substantive convictions, but reversed his first degree persistent felony offender conviction due to insufficient evidence. *Carter v. Commonwealth*, 782 S.W.2d 597, 602 (Ky.1989). After his petition for writ of certiorari to the United States Supreme Court was denied, 497 U.S. 1029, 110 S.Ct. 3282, 111 L.Ed.2d 791 (1990), Carter filed a petition for writ of habeas corpus in the district court, which was denied November 1, 1991. Carter filed a Motion for Certificate of Probable Cause in this Court March 10, 1992, which we granted April 13, 1992.

II.

[1–3] Petitioner's claims on appeal all revolve around Elam's testimony. Petitioner asserts that the prosecutor's decision to continue Elam's deposition after the departure of petitioner's attorney denied him his Sixth Amendment right to counsel, and his right under the Fifth, Sixth and Fourteenth Amendments to be present at all critical stages of the proceeding against him. Petitioner further contends that the failure of the trial court to suppress the deposition at trial violated his Sixth Amendment right to confront his accuser, due both to the Commonwealth's lack of a good-faith effort to obtain Elam's presence at trial and due to the inherent unreliability of a deposition not subjected to cross-examination. Finally, he asserts the admission of Elam's hearsay statements through the officer's testimony at trial was reversible, not harmless, error. We review de novo a district court's refusal to grant a habeas petition, and the district court's factual determinations are reviewed under the clearly erroneous standard. *McCall v. Dutton*, 863 F.2d 454, 459 (6th Cir.1988), *cert. denied*, 490 U.S. 1020, 109 S.Ct. 1744, 104 L.Ed.2d 181 (1989). We defer to state court findings if supported by the evidence. *Lundy v. Campbell*, 888 F.2d 467, 469 (6th Cir. 1989), *cert. denied*, 495 U.S. 950, 110 S.Ct. 2212, 109 L.Ed.2d 538 (1990).

The Sixth Amendment on its face guarantees a criminal defendant the right "to be confronted with the witnesses against him." The Supreme Court has recognized that this language "comes to us on faded parchment ... with a lineage that traces back to the beginnings of Western culture." *Coy v. Iowa*, 487 U.S. 1012, 1015, 108 S.Ct. 2798, 2800, 101 L.Ed.2d 857 (1988). "The Confrontation Clause provides two types of protection to the criminal defendant: the right physically to face those who testify against him, and the right to conduct cross-examination." *Pennsylvania v. Ritchie*, 480 U.S. 39, 51, 107 S.Ct. 989, 998, 94 L.Ed.2d 40 (1987).

1. The phone bill listing these calls appeared in the prosecutor's Motion to Supplement, filed one month after Carter's trial. The identities of the parties called were not given.

Both protections are crucial. "There is something deep in human nature that regards face-to-face confrontation between accused and accuser as 'essential to a fair trial in a criminal prosecution.'" *Coy*, 487 U.S. at 1017, 108 S.Ct. at 2801 (quoting *Pointer v. Texas*, 380 U.S. 400, 404, 85 S.Ct. 1065, 1068, 13 L.Ed.2d 923 (1965)). Similarly, the Confrontation Clause "forces the witness to submit to cross-examination, the 'greatest legal engine ever invented for the discovery of truth,'" *California v. Green*, 399 U.S. 149, 158, 90 S.Ct. 1930, 1935, 26 L.Ed.2d 489 (1970) (quoting 5 J. Wigmore, Evidence § 1367, (3d ed. 1940)).

Against this backdrop, the absence of Carter's counsel during Elam's deposition demands close scrutiny. As the Supreme Court stated in *United States v. Cronic*, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984):

> [I]f counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable.... The Court has uniformly found constitutional error without any showing of prejudice when counsel was either totally absent, or prevented from assisting the accused during a critical stage of the proceeding.

Id. at 659 & n. 25, 104 S.Ct. at 2047 & n. 25. In *Green v. Arn*, 809 F.2d 1257 (6th Cir.), *vacated on other grounds*, 484 U.S. 806, 108 S.Ct. 52, 98 L.Ed.2d 17 (1987), *reinstated*, 839 F.2d 300 (6th Cir.1988), *cert. denied*, 488 U.S. 1034, 109 S.Ct. 847, 102 L.Ed.2d 979 (1989), this court had the opportunity to apply *Cronic* in a situation where defense counsel absented himself from petitioner's trial while the prosecution was presenting its case. Counsel for two other defendants in the case was present, and conducted cross-examination of the state's first witness. Nevertheless, we found that petitioner's rights under the Confrontation Clause had been violated by the absence of her counsel during this critical stage of the proceeding:

> It is difficult to perceive a more critical stage of a trial than the taking of evidence on the defendant's guilt.... The absence of counsel during the taking of evidence on the defendant's guilt is prejudicial per se and justifies an automatic grant of the writ "without any opportunity for a harmless error inquiry." *Siverson v. O'Leary*, 764 F.2d 1208, 1217 [& n. 6] (7th Cir.1985).

Id. at 1263.

[4, 5] This case is similar to *Green*. It is undisputed that Elam's videotaped testimony was the sole evidence supporting Carter's conviction for the drug offenses of November 3, 1985. Although Lt. Ken Rieger was present to be cross-examined at trial, his information concerning the November 3 transactions came entirely from discussions with Elam. He did not travel to Kentucky until November 5. The taping of the deposition was, for all practical purposes, the only time "evidence on the defendant's guilt" was taken. The unmitigated absence of cross-examination at this time meant that Elam's testimony was never subjected to "the crucible of meaningful adversarial testing," *Cronic*, 466 U.S. at 656, 104 S.Ct. at 2045. Of course, *Green* is distinguishable on its facts; the absence of Green's counsel occurred at trial, rather than at a pre-trial deposition. We do not explicitly extend today the holding in *Green* to cover pre-trial depositions as well as trials, however similar the impact on the defendant's Confrontation Clause rights. But our reasoning in *Green* supports our conclusion here that Elam's videotaped deposition was hearsay, and was improperly admitted under the "unavailable witness" exception, Ky.R.Evid. 804 (Baldwin 1992).[2]

2. Ky.R.Evid. 804 states in relevant part:

> Hearsay exceptions: declarant unavailable
>
> (a) Definition of unavailability. "Unavailability as a witness" includes situations in which the declarant:
>
> . . . .
>
> (5) Is absent from the hearing and the proponent of the statement has been unable to procure the declarant's attendance by process or other reasonable means.
>
> . . . .
>
> (b) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> (1) Former testimony. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken

Ky.R.Evid. 804 is substantially identical to Fed.R.Evid. 804, lacking only the residual hearsay exceptions permitted by subsection (5) of the federal Rule. In *Ohio v. Roberts*, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980), the Supreme Court set forth the standard to be applied in defending this hearsay exception against Confrontation Clause claims:

> In sum, when a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then, his statement is admissible only if it bears adequate 'indicia of reliability.' Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness.

Id. at 66, 100 S.Ct. at 2539. In *Barber v. Page*, 390 U.S. 719, 724–25, 88 S.Ct. 1318, 1321–22, 20 L.Ed.2d 255 (1968), the Court articulated the burden which must be met by the Commonwealth to satisfy the "unavailability" prong of the foregoing test: "a witness is not 'unavailable' . . . unless the prosecutorial authorities have made a good-faith effort to obtain his presence at trial." The test for review of compliance with this standard defies precise explication: "The lengths to which the prosecution must go to produce a witness . . . is a question of reasonableness." *Ohio v. Roberts*, 448 U.S. at 74, 100 S.Ct. at 2543 (citing *California v. Green*, 399 U.S. at 189, n. 22, 90 S.Ct. at 1951, n. 22 (concurring opinion)).

We find it unnecessary to reach the issue of whether the Commonwealth's attempts to secure Elam's attendance at trial satisfy the good-faith effort test enunciated in *Barber*, however, because we hold that Elam's deposition, taken in violation of Carter's rights under the Confrontation Clause, could not satisfy the "other adequate indicia of reliability" standard imposed by the unavailable witness exception to the hearsay rule. Elam was not forced to confront Carter as he gave his deposition. He was not cross-examined. These circumstances could not provide the trier of fact with "a satisfactory basis for evaluating the truth of the prior statement." *Dutton v. Evans*, 400 U.S. 74, 89, 91 S.Ct. 210, 219, 27 L.Ed.2d 213 (1970).

[6] The Commonwealth argues that the *Ohio v. Roberts* test is met in this case because Elam's deposition was admitted under a "firmly rooted hearsay exception," 448 U.S. at 66, 100 S.Ct. at 2539, namely Ky.R.Crim.Proc. 7.20(1), which provides in relevant part:

> At the trial or upon any hearing, a part or all of a deposition, *so far as otherwise admissible under the rules of evidence*, may be used if it appears: . . . that the witness is out of the Commonwealth of Kentucky, unless it appears that the absence of the witness was procured by the party offering the deposition; or . . . that the party offering the deposition had been unable to procure the attendance of the witness by subpoena.

(emphasis supplied). This argument is without merit. As the emphasized portion of the preceding text shows, the rule governs production of evidence *subject to* the rules of evidence. Hearsay evidence from unavailable witnesses is governed by Ky.R.Evid. 804(b)(1), which includes the requirement that the party against whom the testimony is now offered had a prior "opportunity and similar motive to develop the testimony by direct, cross, or redirect examination." But this is the very opportunity that was denied to Carter. The requirements of the exception are not met.

The Commonwealth contends that Carter waived his Sixth Amendment rights through his failure to attend the deposition after his attorney sent him written notice and tried to contact him several times by phone. It is not clear why this assertion, if true, would overcome the reliability problem with the deposition. Furthermore, we disagree with the premise. Waiver of the right to confront

> in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

one's accuser is evaluated according to the standards for waiving any constitutional right as enunciated in *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461 (1938), and requires "an intentional relinquishment or abandonment of a known right or privilege." The right "may be waived only by voluntary and knowing action." *Boyd v. Dutton*, 405 U.S. 1, 2–3, 92 S.Ct. 759, 759–761, 30 L.Ed.2d 755 (1972). The trial court found that there was no evidence that Carter ever received the letter from his attorney concerning the deposition, and that finding is presumed correct. 28 U.S.C. § 2254(d). Furthermore, the letter, even if received, did not inform Carter of his constitutional right to attend, nor did it urge him to exercise that right ("you *may* wish to be present") (emphasis supplied). Most importantly, the letter did not provide Carter with any notice of the consequences if he failed to appear—that his attorney would leave the deposition and permit the state's key witness to be deposed without any cross-examination whatsoever. Although a waiver may be implied and not express, there must be evidence in the record to support that implication. This court's statement in *Evans v. United States*, 284 F.2d 393 (6th Cir.1960) is directly applicable: "the record does not show that defendant knew or was advised of his rights. In order to constitute a waiver, there must be a voluntary relinquishment of a *known* right." *Id.* at 395. We find Carter did not personally waive his right to confront Elam.

[7] The district court found that Carter nonetheless effected a waiver of this right through the actions of his attorney, who appeared for the deposition and then departed. We find this conclusion inconsistent with *Zerbst*. As the Second Circuit stated in *United States v. Crutcher*, 405 F.2d 239, 243 (2d Cir.1968), *cert. denied*, 394 U.S. 908, 89 S.Ct. 1018, 22 L.Ed.2d 219 (1969), referring to defense counsel's decision to proceed with jury impanelling in the defendant's absence: "[E]ven assuming [counsel] had the authority to act as Payne's counsel, he would not have the ability to bind Payne to a decision of this type without obtaining Payne's consent." The Tenth Circuit came to a similar conclusion in *Larson v. Tansy*, 911 F.2d 392, 396 & n. 2 (10th Cir.1990):

> The record indicates defendant's counsel, and not defendant, waived defendant's right of presence at trial. The trial court never directly addressed defendant concerning his counsel's request to conduct the remainder of the trial in defendant's absence. We hold that defendant did not waive his right to be present.... Even if defense counsel could have validly waived defendant's right to be present for the conclusion of his trial, where defense counsel did not consult with defendant concerning the waiver and did not obtain defendant's consent, the waiver will not be binding on defendant.

We similarly find that, even if Waller's actions at the deposition could constitute a waiver of the defendant's rights under the Confrontation Clause, the waiver would not bind Carter in the absence of a showing that he consented.[3] As the Supreme Court stated in *Faretta v. California*, 422 U.S. 806, 819, 95 S.Ct. 2525, 2533, 45 L.Ed.2d 562 (1975): "It is the accused, not counsel, who must be 'informed of the nature and cause of the

3. The Kentucky Supreme Court found that "Carter's right to confront Elam at the deposition was waived" because "[a]mple notice of the deposition was provided to Carter's counsel ... There was no evidence that Carter, personally, had a legal reason why he was unable to attend, and no proof that his presence would have made a difference." *Carter*, 782 S.W.2d at 599. This obviously conflicts with our reading of *Zerbst*. Moreover, the Kentucky Supreme Court made statements in an opinion decided the same day, *Dean v. Commonwealth*, 777 S.W.2d 900 (Ky.1989), that would lead to precisely the opposite result from that reached in *Carter*:

> We hold that because the right to be present and to confront is personal to the accused under Section 11 of the Kentucky Constitution, and more particularly under [Ky.R.Crim.Proc.] 7.12, only the defendant can waive this right. The waiver must be sufficiently clear "as to indicate a conscious intent." *Powell v. Commonwealth*, 346 S.W.2d 731, 734 (1961).... [A]ppellant's counsel waived appellant's right to be present at the depositions of the two prosecution witnesses. There is no indication in the record that it was appellant's conscious intent to waive this right and his consequent right to cross-examination. Counsel's waiver being ineffective, there was no waiver.... Appellant was not present; nor was he afforded the right to confront and cross-examine the witnesses called to testify against him.

Id. at 903. We can discern no reason why a different standard was used in deciding Carter's fate.

accusation,' who must be 'confronted with the witnesses against him'.... The right to defend is given directly to the accused; for it is he who suffers the consequences if the defense fails."

We address finally the argument advanced by the Commonwealth that our ruling today will give every defendant's lawyer the power to obtain habeas relief for a client, merely by neglecting to inform the client of opportunities to confront his accusers. We rejected this argument in *Martin v. Rose*, 744 F.2d 1245 (1984), and see no reason to depart from our reasoning in that case:

> [W]e are unwilling to assume that members of the bar will cold-bloodedly adopt [such a] bizarre and irresponsible stratagem.... If such a tactic develops, the trial court must respond, but it is not helpless before an attorney's [tactics].... [T]he court's contempt power or the disciplinary mechanism of the bar may be appropriately invoked.

Id. at 1251–52.

III.

Carter had the right to confront Elam, his accuser. Denial of that right without a valid waiver rendered Elam's deposition unreliable for purposes of admissibility at trial over a hearsay objection. Because Carter's conviction was based solely on Elam's testimony, the error was not harmless. We therefore REVERSE the decision of the district court, and GRANT the petition for writ of habeas corpus.

ORDER

Dec. 16, 1993.

The Kentucky Attorney General's petition to rehear this habeas appeal is denied. The entire thrust of the petition is that petitioner Carter had notice of the deposition used in substitution for live testimony at Carter's criminal trial and that Carter knowingly waived his right of confrontation. This one point is repeated time and again for fifteen pages. The problem with this repeated point is that the record demonstrates that it is simply factually inaccurate, as our previous opinion concludes, and as the state trial judge flatly found as a fact. The state trial judge found that there is no evidence that [Carter] failed to show for the deposition in this case. There is no evidence that he had notice he was supposed to be there. This Court is not empowered to set aside the reasonable factual findings of the Kentucky trial court, undisturbed by the state appellate courts. Thus the only significant evidence at Carter's criminal trial was a deposition of Carter's chief accuser, a deposition Carter had no notice of. Under the Confrontation Clause live testimony subject to cross-examination is required in order to convict in such a case.

Accordingly, the petition to rehear is DENIED.

FIRST AMERICAN NATIONAL BANK, Plaintiff–Appellant,

v.

FIDELITY & DEPOSIT COMPANY OF MARYLAND, Defendant–Appellee.

No. 92–6163.

United States Court of Appeals, Sixth Circuit.

Argued June 24, 1993.

Decided Sept. 28, 1993.

Declaratory judgment action was brought to recover under employee fidelity policies. The United States District Court for the Western District of Tennessee, Odell Horton, Chief Judge, granted judgment for insurer. Appeal was taken. The Court of Appeals, Boyce F. Martin, Jr., Circuit Judge, held that takeover of insured bank and coverage under employee fidelity policies terminated automatically before occurrence under exclusion clause, which terminated coverage immediately upon taking over of insured by another institution, when another bank assumed management control of insured bank after purchasing 80% of insured bank's stock at public foreclosure sale.

Affirmed.

1. Contracts ⇐176(1)
Federal Courts ⇐776

Contract interpretation is a question of law and is subject to de novo review.

COMMONWEALTH OF KENTUCKY

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Mr. William K. Suter
Clerk of the Court
Supreme Court of the United States
Office of the Clerk
Washington, D.C. 20543

RE: 93-1500
Sowders v. Carter

Dear Mr. Suter:

Enclosed please find the original and one copy of the Respondent's Brief in Opposition to the Petitioner's Petition for Writ of Certiorari in the above-styled case.

Very truly yours,

Julie Namkin

Julie Namkin
Assistant Public Advocate

JN/byh

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